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No.
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In the Supreme Court

OF THE

United States

LAFFIT PINCAY, JR. AND CHRISTOPHER J. MCCARRON,
Petitioners,

VS.

VINCENT S. ANDREWS, ROBERT ANDREWS, and,
VINCENT ANDREWS MANAGEMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a suit against fiduciaries alleging mail and wire fraud in violation of 18 U.S.C.S. §§ 1961-1968, the Racketeering Influence and Corrupt Organizations Act as amended before the Private Securities Litigation Reform Act of 1995, [Pub.L.No. 104-67, § 107, 109 Stat. 737, 1758 (1995)], the jury's rejection of the fiduciaries' assertion of the statute of limitations mandates a finding for petitioners regarding that defense.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS	1
JURISDICTION	1
STATUTES	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	6
I. COURT OF APPEALS' DECISION CONFLICTS WITH SEVENTH CIRCUIT'S AND EIGHTH CIRCUIT'S "NO BARE ACCESS ACCRUAL" RULE	7
II. OTHER FEDERAL COURTS SUPPORT THE SEVENTH CIRCUIT'S AND EIGHTH CIRCUIT'S RULE	12
III. PENDING AND FUTURE LITIGATION AFFECTED	15
CONCLUSION	18
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases

Page

Andrews vs. Congar, 102 U.S. 107 (1880) 10, 11

Armstrong vs. McAlpin, 699 F.2d 79 (2nd Cir. 1983) 13

Bailey vs. Glover, 88 U.S. 342 (1874) 17

Beneficial Standard Life Ins. Co. vs. Madariaga, 851 F.2d 271 (9th Cir. 1988) 15

Cooperativa De Ahorro vs. Kidder, Peabody & Co., 129 F.3d 222 (1st Cir. 1997) 13

De Bruyne vs. Equitable Life Assur. Soc. of the U.S., 920 F.2d 457 (7th Cir. 1990) 12

De Cordova vs. Hood, 84 U.S. 1 (1873) 10

Davidson vs. Wilson, 973 F.2d 1391 (8th Cir. 1992) 6, 7, 8, 9, 10

Dodds vs. Cigna Securities, Inc., 12 F.3d 346 (2nd Cir. 1993), cert. denied 511 U.S. 1019 (1994) 12

Fujisawa Pharmaceutical Co. Ltd. vs. Kapoor, 115 F.3d 1332 (7th Cir. 1997) 6, 7, 8, 9, 16

Great Rivers Co-Op of S.E. Iowa vs. Farmland Indus., 120 F.3d 893 (8th Cir. 1997) 6, 7, 8, 9, 16

Hilton vs. Mumaw, 522 F.2d 588 (9th Cir. 1975) 14, 17

Luksch vs. Latham, 675 F.Supp. 1198 (N.D. Cal. 1987) 14, 17

McCool vs. Strata Oil, 972 F.2d 1452 (7th Cir. 1992) 6, 7, 9

Pincay vs. Andrews, 238 F.3d.....1, 6, 14, 15

TABLE OF AUTHORITIES

CASES

	Page
Pinney Dock and Transport Co. vs. Penn Cent. Corp., 838 F.2d 1445 (6th Cir. 1988) cert. denied sub nom. *Pinney Dock and Transport Co. v. Norfolk & Western R. Co.*, 488 U.S. 880 (1988)	16
Ritchey vs. Horner, 244 F.3d 635 (8th Cir. 2001)	7, 16
Rosenthal vs. Walker, 111 U.S. 185 (1884)	16
Rotella vs. Wood, 528 U.S. 549 (2000)	7, 16
Scott vs. Boos, 215 F.3d 940 (9th Cir. 2000)	6
St. Mary's Honor Center vs. Hicks, 509 U.S. 502 (1993)	10, 11
Tafflin vs. Levitt, 493 U.S. 455 (1990)	16
Tregenza vs. Great American Communications Co., 12 F.3d 717 (7th Cir. 1993), cert. denied 511 U.S. 1085 (1994)	10
Volk vs. D.A. Davidson & Co., 816 F.2d 1406 (9th Cir. 1987)	14
Vucinich vs. Paine, Webber, Jackson & Curtis, Inc., 739 F.2d 1434 (9th Cir. 1984)	14, 17
Vucinich vs. Paine, Webber, Jackson & Curtis, Inc., 803 F.2d 454 (9th Cir. 1986)	14, 17
Wood vs. Carpenter, 101 U.S. 135 (1879)	16

Rules

Federal Rules of Evidence	
Section 301	10

TABLE OF AUTHORITIES

STATUTES

Page

Statutes

Private Securities Litigation Reform Act of 1995 [Pub. L. No. 104-67, Section 107, 109 Stat. 737, 1758 (1995)] 6

18 U.S.C.S.

Section 1341 1

Section 1343 1

Section 1961 1

Section 1962(c) 1

Section 1964(c) 1

Section 1965(a), (b) and (d) 1

28 U.S.C.S.

Section 1254(1) 1

Section 1331 2

Textbooks

29 Am Jur 2d Evidence

Section 282 (2000) 10

Restatement Contracts (2d)

Section 209 10

Laffit Pincay, Jr. and Christopher J. McCarron respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS

The court of appeals' opinion is at 238 F.3d 1106 (9th Cir. 2001)[1], but the court did not publish the decision denying rehearing.[2] The district courts' decisions are unpublished.[3]

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C.S. § 1254(1). More specifically, on February 6, 2001 the court of appeals entered its judgment. On March 28, 2001, it denied petitioners' timely filed request for rehearing and suggestion for rehearing en banc.

STATUTES

This petition involves 18 U.S.C.S. §§ 1961, 1962(c), 1964(c)(as amended 1984), and 1965(a), (b), and (d) of the Racketeering Influence and Corrupt Organizations Act ("RICO"), and 18 U.S.C.S. § 1341 and § 1343.[4]

STATEMENT OF THE CASE

In 1989 petitioners sued respondents Vincent S. Andrews, Robert Andrews, and Vincent Andrews Management Corporation ("VAMC") in the United States District Court for

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[1] See also Appendix A.

[2] Appendix at B.

[3] Appendix at C and D.

[4] Appendix at E.

the Central District of California. Relevant here, petitioners invoked the district court's original jurisdiction under 28 U.S.C.S. § 1331 because, while acting as petitioners' fiduciaries, respondents separately associated together as a RICO enterprise that used the mail and telephone to obtain money from petitioners by fraudulent representations and concealment.

In 1992 the jury ruled in favor of petitioners. Relevant here, the jury rejected respondents' assertion of the statute of limitations. Among other facts supporting the jury's decision, the record shows the following.

Respondent Vincent S. Andrews orally agreed with Pincay in 1969 (the year Pincay turned twenty-three years old) that for a total of 5% of Pincay's yearly income, Vincent S. Andrews would manage and invest Pincay's money.[5] Pincay had the same oral agreement with Vincent S. Andrews' father, who had managed and invested Pincay's money from 1967 until 1969.[6]

Vincent S. Andrews used respondent VAMC's employees to do several of the services for Pincay, including but not limited to depositing checks, paying bills, balancing checkbooks, preparing tax returns. The 5% of Pincay's yearly income was paid to VAMC.[7] In 1972, respondent Robert Andrews (Vincent S. Andrews' brother) began working for VAMC. He thereafter became (1) a shareholder, director and officer of VAMC, and (2) the sole shareholder of Andrews & Company Inc., a Connecticut corporation that he used for consulting and management work in real estate.

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[5] Pincay was, and continues to be, a professional thoroughbred jockey, which is a hazardous and physically rigorous occupation demanding Pincay's full attention.

[6] The father died in 1969.

[7] Vincent S. Andrews owned and operated VAMC, which he organized as a New York corporation in 1969.

Vincent S. Andrews and Robert Andrews were separately and personally involved in finance and real estate endeavors apart from VAMC.

Unknown to Pincay, beginning in 1972 Vincent S. Andrews, Robert Andrews and VAMC separately associated together to deceive Pincay into investing in many partnerships in which either Vincent S. Andrews, Robert Andrews, or VAMC had a personal financial interest. They used their fiduciary relationships with Pincay to lull him into a sense of trust or security so that he would not suspect the respondents' scheme. As an example of Pincay's level of trust, in his will he named Vincent S. Andrews the executor. Moreover, respondents knew that Pincay was unsophisticated about financial matters.

Vincent S. Andrews would telephone Pincay to describe the investment and recommend very strongly that Pincay invest. He intentionally did not tell Pincay, however, that he (or Robert Andrews, or VAMC) had a personal financial interest in the investment, and that the investment would use part of Pincay's money to pay compensation to Vincent S. Andrews, Robert Andrews, or VAMC in addition to the 5% of Pincay's yearly income.

The respondents intentionally withheld the investment documents from Pincay until after (1) Vincent S. Andrews persuaded Pincay to invest during the phone call, and (2) Pincay had signed and returned the check prepared by respondents for the investment. Respondents would then mail, and occasionally have a messenger deliver, the investment documents to Pincay for signature.[8]

Pincay could not understand the documents. For example, Pincay left school in Panama after the ninth grade. He spoke Spanish as his first language. Moreover, when he told

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[8] Respondents affixed post-it arrows directing Pincay where to sign.

Vincent S. Andrews that he could not understand the documents, Vincent S. Andrews said that Pincay should not bother reading the documents because he, Vincent S. Andrews, had already analyzed them and he would not put Pincay into any investment that would hurt Pincay. After Vincent S. Andrews said that, Pincay did not read the investment documents. Moreover, respondents never explained the documents to Pincay, and never disclosed that the investments were using part of Pincay's money to pay compensation to one or more of the respondents in addition to 5% of Pincay's yearly income.

The jury determined that respondents' fraud caused $670,685 in damages to Pincay, including the loss of money caused by twenty-nine investments that Pincay would not have approved but for the respondents' mail and wire fraud. Moreover, the jury determined, in effect, that Pincay did know and should not have known of his RICO injury more than four years before he sued petitioners.

Regarding McCarron, Vincent S. Andrews and McCarron orally agreed in 1979 (the year McCarron turned twenty-four years old) that Vincent S. Andrews would invest McCarron's money, the VAMC employees would handle McCarron's bookkeeping, and the accountants would handle the tax preparation, all for not more than 5% of McCarron's yearly income.[9] McCarron did not know, however, that Vincent S. Andrews, Robert Andrews, and VAMC separately associated together to deceive McCarron into investing in partnerships in which Vincent S. Andrews, Robert Andrews, or VAMC had a personal financial interest. Without repeating the details here, respondents used, in essence, the same mail and wire fraud scheme on McCarron that they used on Pincay. McCarron completely trusted the

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[9] McCarron also was, and continues to be, a professional thoroughbred jockey.

respondents. In his will, he also named Vincent S. Andrews the executor.

McCarron had a high school education, was unsophisticated about financial matters, and he did not understand the investment documents. When he told Vincent S. Andrews that he could not understand the documents, Vincent S. Andrews said not to bother reading them because the documents had already been analyzed. Moreover, respondents never explained the documents to McCarron, and never disclosed to him that the investments were using part of his money to pay compensation to one or more of the respondents in addition to 5% of his yearly income.

The jury determined that the respondents' fraud caused a total of $313,841 in compensatory damages to McCarron, including the money lost from the thirteen investments McCarron would not have approved but for the respondents' mail and wire fraud. The jury also decided, in effect, that McCarron did not know and should not have known of his RICO injury before 1985.

After the district court entered the judgments, respondents filed a motion for judgment as matter of law contending, in relevant part, that petitioners filed the RICO claims too late. After the hearing on the motion, but before the district court ruled, respondents filed bankruptcy. Over a year later, the bankruptcy court allowed the case to resume.

The district court reviewed the record and found it supported the jury's decision that respondents timely filed the RICO claims.[10] The district court, however, granted VAMC judgment as a matter of law on other grounds, and, therefore, vacated the judgments.[11] In August of 1997, the district court reconsidered its ruling and denied all of the

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[10] Appendix at C-14.

[11] Appendix at C-17 and 18.

respondents' post trial motions.[12] In 1998, the district court again entered judgments on the RICO claims. The respondents filed an appeal.

Among other issues, respondents argued that the Private Securities Litigation Reform Act of 1995[13], and the statute of limitations, precluded the RICO claims as a matter of law. The court of appeals rejected the first argument.[14] The court ruled, however, that the RICO claims were filed too late because, according to the court, before 1985 the statute of limitations started running, as a matter of law, as soon as petitioners received and signed documents that the court interpreted to be a written disclosure of the RICO injury.[15] On that basis, the court of appeals reversed the judgments.[16]

Petitioners requested a rehearing, and suggested a rehearing en banc. The court of appeals denied the requests.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision conflicts with *Fujisawa Pharmaceutical Co. Ltd. v. Kapoor,* 115 F.3d 1332 (7th Cir. 1997), *McCool v. Strata Oil,* 972 F.2d 1452 (7th Cir. 1992), *Great Rivers Co-Op of S.E. Iowa v. Farmland Indus.,* 120 F.3d 893 (8th Cir. 1997), and *Davidson v. Wilson,* 973 F.2d 1391 (8th Cir. 1992). The conflict pertains to a recurring

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[12] Appendix at D-11 through 13.

[13] Pub.L.No. 104-67, § 107, 109 Stat. 737, 1758 (1995).

[14] *Pincay v. Andrews, supra.,* 238 F.3d at 1108 n. 1, citing *Scott v. Boos,* 215 F.3d 940, 942-49 (9th Cir. 2000).

[15] *Pincay v. Andrews, supra.,* 238 F.3d at 1110. The documents referred to by the court of appeals are in Appendix at F, G, H, I, and J.

[16] The court of appeals did not reach any of the other issues raised by the parties, such as petitioners' cross-appeal that questioned the district court's refusal to also include in the judgments the state law punitive damages awarded by the jury. *Id.* at 1110.

situation in federal civil litigation involving the "injury discovery accrual rule." Accordingly, the need for guidance from this Court is acute. This case is a timely opportunity to provide that guidance after *Rotella v. Wood,* 528 U.S. 549 (2000).

I.

COURT OF APPEALS' DECISION CONFLICTS WITH SEVENTH CIRCUIT'S AND EIGHTH CIRCUIT'S "NO BARE ACCESS ACCRUAL" RULE

The Seventh Circuit holds that "bare access to necessary information" does not start the statute of limitations running as a matter of law. 115 F.3d at 1335; 972 F.2d at 1456 and 1463. The Eighth Circuit agrees. 120 F.3d at 897; 973 F.2d at 1393 and 1400.

To trigger the duty to access the "necessary information," both Circuits require undisputed evidence that (1) a suspicious circumstance occurred, (2) the suspicious circumstance was sufficient to prompt accessing the information, and (3) the plaintiff was aware of that suspicious circumstance.[17] For example, in *McCool,* the plaintiffs acknowledged that they knew of the discrepancy between the agreements they signed and the unredacted reports the defendant sent them a year later. Simply put, the plaintiffs

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[17] See also *Ritchey v. Horner,* 244 F.3d 635, 640-41 (8th Cir. 2001) ("But the facts relied upon to support inquiry notice must rise to a level of more than mere suspicion; they must instead be 'sufficiently confirmed or substantiated' to a point at which the victims are incited to investigate . . . What effect the relationship may have had on how plaintiffs viewed what (the defendants) told them cannot be adequately adjudged on summary judgment. Consequently, we cannot say as a matter of law that (the defendants') statements were 'unconvincing' and that plaintiffs should have been led to investigate.")

admitted knowing years before they sued that "something was clearly amiss."[18]

In *Fujisawa,* the plaintiff-pharmaceutical corporation received and signed documents when it purchased the defendant-drug manufacturer. The plaintiff subsequently sued the defendant alleging violations of RICO, and federal securities statutes. Although claiming it did not become aware of the fraud until the FDA began an investigation of the defendant, the plaintiff did not dispute it knew among other facts that years before it sued (1) the FDA cited the defendant for many violations, and (2) the FDA seized the defendant's products.[19]

The Eighth Circuit in *Great Rivers* noted that the plaintiff admitted he knew the defendant's newsletter clearly explained to him that, in effect, the defendant was in a Colorado class action lawsuit based on the same injury and misrepresentation about which the plaintiff complained.[20] In *Davidson* the plaintiffs acknowledged they were sophisticated investors, and knew a substantial discrepancy existed between the investment document they signed and the Schedule K-1 that the defendant subsequently sent them. The K-1 directly contradicted what the agreement said about the allocation of partnership tax losses and cash distributions.[21]

In sharp contrast, no undisputed evidence in the record shows conclusively that before 1985 either that the petitioners were aware of a suspicious circumstance, or that the respondents clearly disclosed that petitioners were paying more than 5% of their yearly income for the services

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[18] *McCool, supra.,* 972 F.2d at 1463.

[19] *Id.* at 1336-37.

[20] *Great Rivers, supra.,* 120 F.3d at 897-98.

[21] *Davidson, supra.,* 973 F.2d at 1394, 1400.

provided by respondents. Accordingly, if the Seventh Circuit and the Eighth Circuit reviewed this case, both would agree with the district court here that the statute of limitations did not start running as a matter of law when petitioners received and signed documents before 1985.

To be sure, the Seventh Circuit and Eighth Circuit cases cited above also involve a one year period of repose.[22] Nevertheless, that fact does not diminish the importance of the conflict with the court of appeals' decision. Whether the limitation period is one year or four years, the "no bare access accrual" rule applies.[23] Also, the question of what facts the victim actually knew is material to the objective standard for inquiry notice that is used in the Eighth Circuit and Seventh Circuit. For example, in *Great Rivers,* the Eighth Circuit stated the following: "Farmland argues that we should engage only in the second and third prongs of (the objective standard for inquiry notice) analysis we have set forth, because, according to Farmland, the question of what the victim actually knows is immaterial to our objective standard for inquiry notice. Thus, Farmland would have us *automatically* impute to (the victim) constructive knowledge of any information available . . . regardless of (the victim's) actual awareness. We cannot adopt (Farmland's) analysis . . ."[24]

Accordingly, though many documents petitioners received and signed were agreements, and the parol evidence rule bars the consideration of evidence contradicting the terms of an integrated agreement, well-settled law holds that the issue of whether documents formed such an integrated

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[22] See, e.g., *Fujisawa, supra.,* 115 F.3d at 1335.

[23] *Ibid; Great Rivers, supra.,* 120 F.3d at 897. See also *McCool, supra.,* 972 F.2d at 1456, 1463; *Davidson, supra.,* 973 F.2d at 1394, 1400.

[24] *Great Rivers, supra.,*120 F.3d at 897, citing *Fujisawa, supra.,* 115 F.3d at 1335, 1336-37.

agreement is a question of fact that all the evidence must determine.[25] The record in this case supports a finding that no agreement existed, let alone an integrated one, that Pincay and McCarron would pay more than 5% of their yearly income for the services provided by respondents.[26] Similarly, though cases often say that a person's signature on a contract raises a presumption that the person knew and understood the contents of the contract and agreed to its terms,[27] the presumption is not conclusive.[28]

Finally, while the Seventh Circuit holds that defendants must prove inquiry notice,[29] and the Eighth Circuit holds that plaintiffs must prove "no inquiry notice,"[30] both Circuits would arrive at the same point of agreement about this case: the jury's rejection of respondents' assertion of the statute of limitations mandates a finding for petitioners regarding that defense.

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[25] See, generally, Restatement Contracts (2d) § 209, Comment: *c Proof of integration* (1981).

[26] See, e.g., Appendix at F, G, H, I, and J.

[27] See, generally, 29 Am Jur 2d Evidence § 282 (2000).

[28] See, e.g., *Andrews v. Congar,* 102 U.S. 107 (1880) ("In this way, it seems to us, the case upon this point was fairly put to the jury . . . If the presumption arising from their indorsement had been overcome by the evidence, the jury were told in express terms to find accordingly.") *Id.* at 108; *De Cordova v. Hood,* 84 U.S. 1, 6-7 (1873); Federal Rules of Evidence § 301. See also *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993) ("The plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own evidence and through cross-examination of the defendant's witnesses . . . that [he] has been the victim of (fraud)." *Id.* At 506-08.).

[29] *Tregenza v. Great American Communications Co.,* 12 F.3d 717, 718-19 (7th Cir. 1993), cert. denied 511 U.S. 1085 (1994).

[30] *Davidson, supra.,* 973 F.2d at 1402, n.8 (8th Cir. 1992).

The Seventh Circuit would hold that evidence of petitioners receiving and signing the documents to which the court of appeals referred is not enough to presume conclusively that the statute of limitations started running more than four years before petitioners sued. Accordingly, petitioners would have, as the district court allowed here, a full and fair opportunity to demonstrate through the presentation of their own evidence that they did not have inquiry notice before 1985. Petitioners' evidence having been presented, the jury proceeded to decide the ultimate question: whether respondents proved petitioners had inquiry notice because they received and signed documents before 1985. The jury's rejection of respondents' argument (particularly since evidence of respondents' mendacity accompanied the rejection) suffices to show that petitioners did not have knowledge of facts that would trigger the duty to inquire before 1985. Thus, rejection of the respondents' proffered reasons for why petitioners had that knowledge permits the jury to infer the ultimate fact of no inquiry notice, and, therefore, that petitioners did not have constructive knowledge of the RICO injury before 1985.[31] The Seventh Circuit would rule, therefore, that the jury and the district court are right and their decisions mandate a finding for petitioners regarding the statute of limitations.

The Eighth Circuit would agree with the Seventh Circuit, but from a different angle, namely, that petitioners presented enough evidence to prove they did not have inquiry notice before 1985, and, therefore, the jury's finding on that issue scotches the respondents' assertion of the statute of limitations.

In sum, the court of appeals' decision contradicts the Seventh Circuit and the Eighth Circuit's "no bare access

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[31] Cf. *St. Mary's Honor Center, supra.*, 509 U.S. at 511; *Andrews, supra.*, 102 U.S. at 108.

accrual" rule. The Court should grant Pincay and McCarron's petition to review this important conflict.

II.

OTHER FEDERAL COURTS SUPPORT THE SEVENTH CIRCUIT'S AND EIGHTH CIRCUIT'S RULE

The First Circuit in *Dodds v. Cigna Securities, Inc.*[32] noted that the victim acknowledged that the single page disclosure documents she signed explicitly warned her about the conditions she alleged in her complaint. "Most of the forms prominently state near the top: 'I fully understand the illiquid nature of an investment in [the limited partnership] and that no secondary market is likely to exist for limited partnership units.' "[33]

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[32] 12 F.3d 346 (2nd Cir. 1993), cert. denied 511 U.S. 1019 (1994).

[33] *Id.* at 351. The Second Circuit also cited *De Bruyne v. Equitable Life Assur. Soc. of the U.S.*, 920 F.2d 457 (7th Cir. 1990), which stated that "plaintiffs cannot avoid the statute of limitations by possessing, but failing to read, the documents that would put them on inquiry notice." *Id.* at 466 n.18. In that case, however, the plaintiffs were participants in the ABA Members Retirement Plan who admitted that they " 'suspected that the Balanced Fund was unbalanced in mid-October, 1987,' more than a year before they filed suit. In their reply brief, plaintiffs admit(ed) that Debruyne received a document in mid-November that made him 'suspicious.' And if those statements alone are insufficient, Equitable's consistent and continuous precrash disclosure also gave rise to a duty of inquiry on the part of plaintiffs." *Id.* at 466. No undisputed evidence such as that is in the record here. Simply put, Pincay and McCarron were unsophisticated about financial matters; they denied that the investment documents made them suspicious; Vincent S. Andrews, their trusted fiduciary, persuaded them not to read the documents; respondents never disclosed to Pincay and McCarron, let alone consistently or continuously, that the compensation from the investments was on top of 5% of Pincay's and McCarron's yearly income.

Here, none of the documents stated, let alone explicitly or prominently, that Pincay and McCarron understood that the compensation referred to in the documents was in addition to 5% of their yearly income.[34]

In *Armstrong v. McAlpin*[35] the Second Circuit noted that the allegations of the plaintiffs' complaint simply lifted statements from a Peat Marwick & Mitchell audit report, which the SEC made public in a complaint that began a well-publicized action against the defendants years before the plaintiffs sued.[36] The plaintiffs admitted, in effect, that they knew and understood the audit report and the SEC complaint.

The First Circuit in *Cooperativa De Ahorro v. Kidder, Peabody & Co.*[37] started the statute of limitations running as a matter of law as to a plaintiff-savings and loan because no dispute existed that years before suing the defendant (1) the plaintiff received and knew that the defendant's account summary directly disclosed that bonds purchased between June and December of 1986 had lost 10 percent of their value, (2) the plaintiff received and knew that the defendant's letter (which accompanied the account summary) stated, in effect, that the defendant would analyze the loss in more detail, and (3) a month after receiving both the account summary and the letter, the plaintiff called the defendant's former broker to ask why the bonds had lost value.[38]

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[34] See Appendix at F, G, H, I, and J.

[35] 699 F.2d 79 (2nd Cir. 1983).

[36] *Id.* at 88.

[37] 129 F.3d 222 (1st Cir. 1997).

[38] *Id.* at 223.

Several decisions from other courts of the Ninth Circuit support the Seventh Circuit and the Eighth Circuit.[39] Indeed, *Volk v. D.A. Davidson & Co.*,[40] which the court of appeals cited,[41] based that decision on the fact that plaintiffs were coal mine investors who did not deny that they were sophisticated, and that they understood the statements in the documents provided by the defendant.[42] Indeed, the documents clearly informed the plaintiffs that they had purchased investments in coal reserves, which lacked mineable coal and could not sustain a viable commercial operation.[43] In other words, no dispute existed that the documents directly disclosed to the plaintiffs, and that the plaintiffs knew, that "they paid more for their investment than it was worth."[44]

Pincay and McCarron denied they were sophisticated investors, and denied they understood the documents they received and signed. After considering all the evidence including watching and listening to Pincay and McCarron testify, the jury concluded that Pincay and McCarron did not know and should not have known that the compensation

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[39] See, e.g., *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436-37 (9th Cir. 1984) and later at 803 F.2d 454, 459-61 (9th Cir. 1986); *Hilton v. Mumaw*, 522 F.2d 588, 595-97, 601-02 (9th Cir. 1975) (see, e.g.,: "Hiltons argue that W.C. Mumaw lacked notice of the fraud underlying the 1957 and 1958 contracts because he could reasonably rely on his fiduciary relationship with Mumaws. This argument is not so doubtful that it may be taken from the jury." *Id.* at 595.); *Luksch v. Latham*, 675 F.Supp. 1198, 1201-04 (N.D.Cal. 1987).

[40] 816 F.2d 1406 (9th Cir. 1987).

[41] *Pincay v. Andrews, supra.*, 238 F.3d at 1109-10.

[42] *Volk, supra.*, 816 F.2d at 1409-1411, 1417.

[43] *Id.* at 1417.

[44] *Ibid.*

referred to in the documents was in addition to the 5% of their yearly income.

In *Beneficial Standard Life Ins. Co. v. Madariaga*[45] (which the court of appeals cited besides *Volk*[46]) triable issues of fact existed about whether the plaintiff-insurance company should have known of the defendants' schemes when the plaintiff investigated its own employee more than four years before suing the defendants. Stated another way, the information developed by the plaintiff's investigation proved that, years before suing, it was aware of that about which it was complaining.[47]

In sum, the court of appeals' decision contradicts decisions of other federal courts that support the Seventh Circuit and the Eighth Circuit's "no bare access accrual" rule.

III.

PENDING AND FUTURE LITIGATION AFFECTED

Apart from the actual litigants here, the conflict between the Court of Appeals' decision and the "no bare access accrual" rule of the Seventh Circuit and the Eighth Circuit affects future and pending federal litigation involving the statute of limitations. The parties and the federal courts will, therefore, depend on whether this Court agrees with the view of the Seventh Circuit and the Eighth Circuit, or that of the court of appeals here. Moreover, given the recurring nature of the issue, no end to the debate is in sight unless this Court grants certiorari. Whatever this Court determines to be the correct answer, however, the questions raised by this petition are federal questions that this Court should

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[45] 851 F.2d 271 (9th Cir. 1988).

[46] *Pincay v. Andrews, supra.*, 238 F.3d at 1110.

[47] *Beneficial, supra.*, 851 F.2d at 275-76.

determine. Indeed, unless the Court grants the petition and resolves the conflict, many parties will also find themselves entrusting the resolution of the conflict to state courts.[48]

To be sure, this Court in *Wood v. Carpenter* said that "[t]he means of knowledge are the same thing in effect as knowledge itself."[49] The Court subsequently noted, however, that *Wood v. Carpenter* construed Indiana's statute of limitations by following what the Indiana Supreme Court ruled.[50] Accordingly, the Sixth Circuit concluded that *Wood v. Carpenter* is limited to construing Indiana law.[51] Moreover, as discussed above, the Seventh Circuit and Eighth Circuit make it clear that the question of whether a victim had the "means of knowledge" is by its terms a factual analysis, and, therefore, a fact finder may decide, based on all the evidence, which side prevails on that issue.[52]

Respondents might argue that the court of appeals' decision serves RICO's policy of encouraging victims to investigate diligently. To be sure, *Rotella* recognized that policy.[53] The court of appeals' decision, however, does too much automatically. First, it does not consider, for example, that the existence of a fiduciary relationship often lulls the beneficiary into a sense of trust or security, such that a document received and signed by the beneficiary may not

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[48] See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

[49] *Wood v. Carpenter*, 101 U.S. 135, 143 (1879).

[50] *Rosenthal v. Walker*, 111 U.S. 185, 190-91 (1884).

[51] *Pinney Dock and Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1468 (6th Cir. 1988), cert. denied sub nom. *Pinney Dock and Transport Co. v. Norfolk & Western R. Co.*, 488 U.S. 880 (1988).

[52] *Great Rivers, supra.*, 120 F.3d at 897; *Fujisawa, supra.*, 115 F.3d at 1335. See also *Ritchey, supra.*, 244 F.3d at 640-41.

[53] *Rotella, supra.*, 528 U.S. at 557-58.

excite the beneficiary's suspicion about the fiduciary.[54] Second, the beneficiary's unsophistication, which is often the very reason that people hire or appoint fiduciaries in the first place, often causes the beneficiary not to suspect the fiduciary at all.[55] Finally, it does not consider that when the defendant chose the wording of the document, the defendant might provide more carefully for the protection of the defendant's own interests than for those of the unsophisticated victim. The defendant is also more likely than the unsophisticated victim to have reason to know of uncertainties of the meaning of the words the defendant chooses. Indeed, the defendant may leave the meaning deliberately obscure, intending to decide later what meaning to assert.[56]

In sum, this petition presents an appropriate opportunity for the Court to address important questions of federal law that have caused conflict between the court of appeals here and other federal courts.

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[54] Cf., e.g, *Vucinich, supra.*, 739 F.2d at 1436-37 and later at 803 F.2d 459-61; *Hilton, supra.*, 522 F.2d at 595-97; *Luksch, supra.*, 675 F.Supp. at 1202-03.

[55] *Ibid.*

[56] Cf. *Bailey v. Glover,* 88 U.S. 342 (1874) ("To hold that . . . by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the . . . the means by which it is made successful and secure." *Id.* at 349.).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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June 25, 2001

APPENDIX A

LAFFIT PINCAY, JR;
CHRISTOPHER J. MCCARRON,
Plaintiffs-Appellees-Cross-Appellants,
v.
VINCENT S. ANDREWS; ROBERT L. ANDREWS;
VINCENT ANDREWS MANAGEMENT CORP.,
Defendants-Appellants-Cross-Appellees.

Nos. 98-55217, 98-55288, 98-55449

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

238 F.3d 1106; 2001 U.S. App. LEXIS 1553

October 2, 2000, Argued and Submitted,
Pasadena, California

February 6, 2001, Filed

[*1107]

David Boies, Boies, Schiller & Flexner, Armonk, New York, for the defendants-appellants/cross-appellees.

Neil Papiano, Iverson, Yoakum, Papiano & Hatch, Los Angeles, California, for the plaintiffs-appellees/cross-appellants.

Appeal from the United States District Court for the Central District of California; Wm. Matthew Byrne, Jr., Senior District Judge, Presiding. D.C. No. CV-89-01445-WMB.

Before: O'Scannlain, Fernandez, and Rawlinson, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether the civil Racketeer Influenced and Corrupt Organizations Act ("RICO") statute of limitations begins to run, as a matter of law, upon receipt of written disclosure of the alleged injury.

I

Lafitt Pincay and Christopher McCarron are professional horse racing jockeys who have been inducted into the sport's Hall of Fame. Vincent Andrews ("Vincent"), Robert Andrews ("Robert"), and their company, Vincent Andrews Management Corporation ("VAMC") (collectively "Andrews"), are investment advisors whom both Pincay and McCarron retained between 1969 and 1988.

Pincay began investing the earnings from his racehorse riding in 1967, when he orally employed Vincent's father, also named Vincent Andrews, to manage his financial affairs for a flat fee of 5% of his annual income. Pincay orally continued this arrangement in 1969, including the 5% flat fee, when Vincent took over his father's business and formed VAMC. In 1972, Vincent's brother, Robert, joined VAMC. Pincay's arrangement with VAMC called for the firm to handle Pincay's financial, accounting, and tax matters. McCarron orally entered into the same arrangement with VAMC, including the 5% flat fee, beginning in 1979. Pincay terminated his arrangement with VAMC in 1987 and McCarron did so in 1988.

Throughout their arrangements with VAMC, the firm recommended to Pincay and McCarron dozen of investment opportunities, and they partook in many of these. Many were ventures in which Robert, Vincent, or VAMC held a stake. For example, in some ventures the Andrews held a partnership interest, and in others they would be paid compensation based on the amount of capital invested in the

venture. Many of these came with written disclosure of the Andrews' financial interest. For example, a document associated with one venture, dated 1972 and signed by Pincay, binds Pincay to pay "Andrews & Co." 10% of the capital distribution of the venture. Another, dated 1984 and signed by McCarron, lists Andrews & Co., a "corporation controlled by Robert Andrews," as the managing partner of the venture. A similar document, dated 1984 [*1108] and signed by Pincay, explains that the managing partner, listed as Andrews & Co. "controlled by Robert Andrews," will receive a management fee equal to a fraction of the amount invested in the venture. Perhaps the most explicit is a document, dated 1980 and signed each by Pincay and McCarron, which notes that Robert "will receive compensation from the [venture] . . . in the amount of five percent (5%) of the capital contributions to be paid by such investors."

In 1989, after they had terminated their arrangements, Pincay and McCarron sued the Andrews in the Federal District Court for the Central District of California. They alleged various state law claims, including breach of contract and breach of fiduciary duties, as well as mail and wire fraud violations of RICO. Their theory of RICO liability argued that the Andrews had committed mail and wire fraud by taking, in violation of their oral agreements, more than 5% of their annual income, in the form of the payments the Andrews additionally received from the ventures in which they invested. The jury returned verdicts on both the state and RICO claims against Vincent, Robert, and VAMC. The jury found that Pincay would not have invested in 29 ventures, and McCarron would not have invested in 13 ventures, but for the Andrews' unlawful conduct. The jury awarded Pincay $670,685 and McCarron $313,000 in compensatory damages for their state and RICO claims. Pincay also received $2.25 million, and McCarron roughly $1.3 million, in punitive damages for the state law violations. The

district court awarded Pincay $603,967 and McCarron $255,986 in attorneys fees under RICO. At the court's behest, Pincay and McCarron elected to treble their compensatory damages under RICO in lieu of the compensatory and punitive damages available under state law.

The Andrews filed a renewed motion for judgment as a matter of law and a motion for a new trial, in which they argued that the statute of limitations had run and that there was insufficient evidence both to support a RICO claim and to support the amount of damages awarded. The district court denied these motions. The Andrews filed a timely notice of appeal and argue that their motions were improperly denied. Pincay and McCarron filed a timely notice of cross-appeal and argue that they should not have been forced to elect either RICO treble damages or state law punitive damages. The appeals were consolidated before this court.

II

We first address the Andrews' argument that the statute of limitations had run prior to the time Pincay and McCarron filed their suits in 1989. n1 The jury concluded that the statute of limitations had not run.

> n1 The Andrews argued that, as a threshold matter, Pincay and McCarron's RICO claims were precluded by retroactive application of a provision of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub.L. No. 104-67, § 107, 109 Stat. 737, 1758 (1995). We recently concluded, however, that this provision cannot be applied retroactively. *See Scott v. Boos, 215 F.3d 940, 942-49 (9th Cir. 2000).*

The statute of limitations for civil RICO actions is four years. n2 *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156, 97 L. Ed. 2d 121, 107 S. Ct.*

2759 (1987). Pincay entered into the agreement for investment management services with VAMC in 1969 and McCarron did so in 1979. Pincay and McCarron invested in ventures from which the Andrews stood to make a profit throughout the 1970s and 1980s. Yet, Pincay and McCarron did not file their suits until 1989.

n2 For some reason, the jury was instructed that the statute of limitations was three years, rather than four years. This error does not matter for this appeal, however, because the jury's conclusion that a three-year statute of limitations did not run means that *a fortori* it would have concluded that the four-year statute of limitations had not run.

[*1109] We have continuously followed the "injury discovery" statute of limitations rule for civil RICO claims. *See Grimmett v. Brown, 75 F.3d 506, 511 (9th Cir. 1996)*. n3 Under this rule, "the civil RICO limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Id. at 510* (internal quotation marks omitted). Thus, the "injury discovery" rule creates a disjunctive two-prong test of actual or constructive notice, under which the statute begins running under either prong.

n3 Although the Supreme Court has overruled other statute of limitations standards for civil RICO, *see Rotella v. Wood, 528 U.S. 549, 120 S. Ct. 1075, 1080, 145 L. Ed. 2d 1047 (2000)* (overruling the "injury and pattern discovery rule" of the Sixth, Eighth, Tenth, and Eleventh Circuits); *Klehr v. A.O. Smith Corp., 521 U.S. 179, 187, 138 L. Ed. 2d 373, 117 S. Ct. 1984 (1997)* (overruling the Third Circuit's "last predicate act" rule), it has left our "injury discovery" rule intact. It is important to note, however, that the Supreme Court has explicitly reserved the question of whether

our standard is correct. *See Rotella, 120 S. Ct. at 1080 n.2.*

The plaintiffs argue, and the district court held, that in cases, such as this one, where the injurer and the injured were in a fiduciary relationship with one another, constructive notice does not begin to run the statute of limitations. There is no support for this contention in our cases. In *Volk v. D.A. Davidson & Co., 816 F.2d 1406 (9th Cir. 1987)*, we affirmed summary judgment against RICO plaintiffs on the ground of constructive notice even though the defendants owed the plaintiffs a fiduciary duty. The defendant responsible for sending the plaintiffs written disclosure of their injury in that case was the general partner of the ventures in which the plaintiffs were limited partners, *see id. at 1409.* Under the mid-1970's Montana law applicable in *Volk* (as with the laws of most states), these partners owed one another certain fiduciary duties. *See* Mont. Code Ann. §§ 35-10-401, 402-405 (1991); *Arnold v. Cremer, 163 Mont. 174, 515 P.2d 957, 960 (Mont. 1973)* (recognizing "rules of law" that partners owe each other fiduciary duties).

The only case cited by Pincay and McCarron here and by the District Court in its opinion and order to support the view that constructive notice does not commence the statute of limitations is a non-RICO decision, *Conmar Corp. v. Mitsui & Co., Inc., 858 F.2d 499 (9th Cir. 1988)*. The relied upon language from *Conmar* reads: "Passive concealment of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary duty to disclose information to the plaintiff." *Id. at 505* (internal citations omitted). This language, however, is inapposite to the case at hand because the distinction made in *Conmar* between fiduciary relationships and non-fiduciary relationships was with regard to the doctrine of fraudulent concealment, not the doctrine of constructive notice. Although fraudulent concealment may *toll* the statute of limitations, a question

we confront below, that does not settle the question of when the statute of limitations *began to run.* The two questions are analytically distinct. *See Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 276 (9th Cir. 1988).*

We reaffirm the holding in *Volk* that constructive notice begins to run the statue of limitations regardless of any fiduciary relationship between the injured and the injurer. Thus, if no reasonable jury could find that Pincay and McCarron did not have constructive notice of their injuries before 1985, the Andrews are entitled to judgment as a matter of law. n4.

> n4 Pincay and McCarron note that, even if constructive notice could begin to run the statute of limitations in this case, the jury was instructed otherwise and the Andrews failed to object to the instruction. This, however, does not prevent us from reversing the district court's denial of judgment as a matter of law to the Andrews on this ground because, when reviewing a motion for judgement as a matter of law, we apply the law as it should be, rather than the law as it was read to the jury. *See Air-Sea Forwarders, Inc., v. Air Asia Co., Ltd., 880 F.2d 176, 181-83 (9th Cir. 1989).*

[*1110] The injury alleged by Pincay and McCarron was the act of paying more than 5% of their yearly income to the Andrews. "The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud." *Beneficial Standard Life Ins. Co. 851 F.2d at 275.* It is hard to imagine what would constitute "enough information to warrant an investigation" if receiving a written disclosure of one's purported injury does not. As just one example of the many instances in which Pincay and McCarron received written disclosure of their injury, Pincay and McCarron both signed a document in 1980 disclosing that Robert "will receive compensation from the

[venture] . . . in the amount of five percent (5%) of the capital contributions to be paid by such investors." Clearly, as of 1980, both Pincay and McCarron had "enough information to warrant an investigation" into whether the ventures in which they were investing would result in more than 5% of their annual income finding its way into the wallets of the Andrews. Indeed, in *Volk,* we held, as a matter of law, that receiving written disclosure of the possibility of injury was sufficient to put a civil RICO plaintiff on constructive notice of his injury. *See Volk, 816 F.2d at 1412, 1414-15* (affirming summary judgment for defendants on statute of limitations grounds because the plaintiffs were placed on inquiry notice upon "their receipt of the 1978 annual report and the general partner's September 1979 letter"). We follow *Volk* and hold that, as a matter of law, Pincay and McCarron received constructive notice of their injuries at least as early as 1980. Thus, unless the statute of limitations was tolled, Pincay and McCarron's civil RICO claims are time-barred as a matter of law and the Andrews are entitled to judgment as a matter of law.

III

Pincay and McCarron claim that even if the statute of limitations began to run prior to 1985, the statute was tolled until 1988 because the Andrews "fraudulently concealed" information that prevented them from learning of the fraud. "Equitable tolling doctrines, including fraudulent concealment, apply in civil RICO cases." *Grimmett, 75 F.3d at 514.* "The doctrine is properly invoked only if a plaintiff establishes affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Volk, 816 F.2d at 1415* (internal quotation marks omitted).

Pincay and McCarron cannot prevail on their fraudulent concealment claim in this case because there is a long line of our cases holding that, in order to prevail on such a claim, plaintiffs "must demonstrate that they had *neither actual nor constructive notice* of the facts constituting their claims for relief." *Volk, 816 F.2d at 1415* (emphasis added); *accord Grimmett, 75 F.3d at 514-515* (citing cases). As we decided above, Pincay and McCarron had constructive notice of their injuries prior to 1985 as a matter of law. Thus, they cannot prevail on their fraudulent concealment claim.

IV

Because we conclude that the statute of limitations had run as a matter of law prior to 1989, we need not reach the remaining issues raised by the Andrews regarding the sufficiency of the evidence. Moreover, given that we conclude that their RICO claims were untimely, Pincay and McCarron's cross-appeal raising the issue of election of damages is moot. Finally, our holding is limited to the civil RICO claims at issue on appeal and does not disturb the jury's verdict with regard to Pincay and McCarron's state law claims. Judgment for Pincay and McCarron is

REVERSED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAFFIT PINCAY, JR.; CHRISTOPHER J. MCCARRON	)	
	)	Nos. 98-55217
	)	98-55288
	)	98-55449
Plaintiffs-Appellees/ Cross-Appellants	)	
v.	)	D.C. No. CV-89-01445-WMB
VINCENT S. ANDREWS; ROBERT L. ANDREW; VINCENT ANDREW MANAGEMENT CORP.	)	
	)	ORDER
Defendants-Appellants/ Cross-Appellees	)	

Filed March 28, 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: O'Scannlain, Fernandez, and Rawlinson, Circuit Judges.

The panel has voted unanimously to deny the appellees' petition for rehearing and to deny the appellees' petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAFFIT PINCAY, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-1445-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	ORDER
Defendants.	)	
	)	
CHRISTOPHER J. McCARRON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-4965-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	
Defendants.	)	
	)	

Filed
Clerk U.S. District Court
June 29, 1996
Central District of California
By Deputy

I.

BACKGROUND

These consolidated actions arose out of plaintiffs' claims of misconduct by their longtime business managers and financial advisors in connection with the investment of plaintiffs' funds in a series of limited partnerships. The jury

returned a special verdict in favor of all of plaintiffs' claims, including a federal RICO claim and state law claims for breach of fiduciary duty, breach of oral agreement, negligence, fraud, and negligent misrepresentation. The Court entered the judgment in favor of plaintiffs Laffit Pincay ("Pincay") and Christopher J. McCarron ("McCarron") on October 28 and 29, 1993.

Defendants Vincent Andrews, Jr., Vincent Andrews Management Corp. ("VAMC"), and Robert L. Andrews then moved for judgment as a matter of law or, alternatively, for a new trial. Before the Court ruled on the motion, the action was stayed pending defendants' bankruptcy proceedings. The parties have now informed the Court that the bankruptcy stays have been lifted, and that the motion may be resolved.

II.

STANDARD

A. *Judgment as a Matter of Law*

A judgment as a matter of law is proper "when the evidence permits only one reasonable conclusion as to the verdict." *Garvin v. Greenbank,* 856 F.2d 1392, 1396 (9th Cir. 1988).

> If the evidence, considered as a whole in a light most favorable to the nonmoving party, can support only one reasonable conclusion, then the moving party is entitled to a judgment notwithstanding the adverse verdict. (citation omitted) , . Neither the district court nor (the appeals) court is free to weigh the evidence or reach a result it finds more reasonable if the jury's verdict is supported by substantial evidence."

Id. (citing *Wilcox v. First Interstate Bank of Oregon, N.A.,* 815 F.2d 522, 525 (9th Cir. 1987)).

B. *New Trial*

> The Federal Rules of Civil Procedure provide that (a) new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

Fed. R. Civ. P. 59(a).

In granting a Rule 59 motion for a new trial on the basis of a lack of sufficiency of the evidence, the trial court must have a firm conviction that the jury has made a mistake. A court is "not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions or because [it] feel[s] that other results are more reasonable." *Landes Const. Co., Inc. v. Royal Bank of Canada,* 833 F.2d 1365, 1371-72 (9th Cir. 1987).

III.

DISCUSSION

A. *Procedural Posture of Motion for Judgment as a Matter of Law*

Before reaching the merits, the Court first addresses plaintiffs' procedural attack on defendants' motion for judgment as a matter of law.

Federal Rule of Civil Procedure 50(b) provides that "a motion for a judgment as a matter of law [under Rule 50(a)] made at the close of all the evidence," if denied or not granted by the court, may be renewed by filing a motion not later than 10 days after entry of judgment. Defendants made a written Rule 50(a) motion as to liability issues at the close of plaintiffs' case in the liability trial, and

an oral Rule 50(a) motion as to damages issues at the beginning of the damages trial.

Plaintiffs first contend that defendants' failure to submit a Rule 50(a) motion at the close of "all" the evidence — at the close of the damages trial — precludes defendants from renewing their motion with respect to any issues, including issues relating to liability.

No authority, however, requires that a Rule 50(a) motion addressing the first phase of a bifurcated trial be made after the evidence is presented in the second phase. Moreover, the purpose of Rule 50(b) is to alert "the opposing party to the alleged insufficiency of the evidence at a point in the trial where that party may still cure the defect by presenting further evidence." *Farley Transp. Co. v. Santa Fe Transp. Co.*, 786 F.2d 1342, 1347 (9th Cir. 1985). Because the two trials here were separate, and each self-contained, there would be no purpose served by requiring the Rule 50(a) motion to have been made with respect to liability during the damages trial. The Court finds that defendants' Rule 50(b) motion as to liability is not procedurally defective.

Defendants orally renewed their Rule 50(a) motion on damages at the close of the evidence in the damages trial. Although the Ninth Circuit endorses a "strict application" of Rule 50(b) in requiring that a motion be renewed at the close of all the evidence in a case, it has also noted that courts are "somewhat more liberal about what constitutes a sufficient motion for a directed verdict at the close of all the evidence." *Id.* The fact that a motion was made orally at the close of the evidence in the damages trial does not render a subsequent Rule 50(b) motion procedurally defective.

Plaintiffs next argue that defendants should not be permitted to base a renewed motion on grounds not included in their prior motions. Thus, plaintiffs reason that only the attack on the RICO claim should be renewable, because the

other arguments were not raised in the prior Rule 50(a) motions.

Defendants correctly note, however, that all of the arguments raised in the instant motion have been previously raised in one form or another. The issues not previously raised in the Rule 50(a) motions were made prior to and during the course of trial, and will now be considered under Rule 59 as grounds for new trial or to alter or amend the judgment.

The Court finds that defendants' motion is not procedurally defective.

B. *RICO "Enterprise" Requirement*

The Court first addresses the only one of defendants' arguments that has merit.

1. *VAMC as both enterprise and defendant*

The Ninth Circuit has held that a RICO enterprise cannot also be a defendant in a section 1962(c) RICO claim[1], the "enterprise" itself cannot also be a "person" who participated in the enterprise. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992), *Rae v. Union Bank*, 725 F.2d 478, 480-81 (9th Cir. 1984).

The only RICO enterprise identified in the Pretrial Conference Order was VAMC. (Pretrial Conference Order, § 7.B1 at 43). Accordingly, VAMC cannot, as a matter of law, be liable as a "person" under section 1962(c). VAMC

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[1]Section 1962(c) provides as follows: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a patter of racketeering activity.

18 U.S.C. § 1962(c).

is entitled to judgment as a matter of law on plaintiffs' RICO claim.[2]

2. *Dismissal of VAMC only*

That conclusion does not necessarily extend to the other defendants, however. Neither Vincent S. Andrews, Jr. nor Robert L. Andrews were RICO enterprises, so they were arguably RICO "persons" who could be liable under section 1962(c).

During a February 8, 1994 status conference, the Court asked the parties whether they would stipulate to the dismissal of VAMC alone, maintaining the individual defendants as the only RICO defendants. The parties were instructed to brief their arguments if they disagreed on that issue.

Ostensibly in response to the Court's request, plaintiffs filed a "Brief Re Existence of RICO Enterprise" on February 16, 1994. Defendants responded to that brief on February 23, 1994. Neither brief, unfortunately, addresses the question posed by the Court: whether VAMC alone could be dismissed from plaintiffs' RICO claim. The Court will set a conference call with the parties, and may order briefing on that issue.

3. *VAMC and the Andrews defendants as an "association-in-fact" enterprise*

Instead of addressing the issue of whether VAMC alone could be dismissed, plaintiffs' February 16, 1994 filing asserted, for the first time, that the RICO enterprise was not

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[2]Plaintiffs' reliance on *Schreiber Distributing Co. v. Serv-Wall Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986), is misplaced. In *Schreiber*, the Ninth Circuit allowed a RICO "person" and "enterprise" to be the same entity only as to section 1962(a) and (b) offenses, and acknowledged that courts have "consistently held that in an action under § 1962(c), the 'person' must be a separate and distinct entity from the 'enterprise.' " *Id.* at 1396.

VAMC, but rather the association of VAMC with Vincent and Robert Andrews, See 18 U.S.C. § 1961(4) ("enterprise" can be "any union or group of individuals associated in fact although not a legal entity").

Plaintiffs' belated assertion is without merit. Defendants correctly note that the Pretrial Conference Order identified VAMC — and only VAMC — as the RICO enterprise. (Pretrial Order, §7.B1 at 43). Nonetheless, plaintiffs claim that before the liability case was submitted to the jury, plaintiffs revised the theory of their case such that the enterprise comprised VAMC in addition to the Andrews defendants. (*See* Plaintiffs' Brief Re Existence of RICO Enterprise, pp. 2-3).

Notably, plaintiffs cite no trial transcript for this recollection. Instead, they point to question 31 on the Special Verdict Form, which they contend asked the jury whether an enterprise consisting of VAMC and the two Andrews defendants had been proved. Question 31 asked no such thing; it merely asked, "As to each defendant identified below, were any of the defendants associated with or employed by an enterprise that engaged in business in more than one state?" The Special Verdict Form did not define or ask what the enterprise was, it merely asked what defendants were RICO "persons" associated with the enterprise.[3]

Plaintiff's request to amend the Pretrial Conference Order to describe an enterprise consisting of both VAMC and the Andrews defendants is denied. No evidence of the structure

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[3]It is also telling that plaintiffs' February 16, 1994 recollection of their purported mid-trial redefinition of the RICO enterprise came only after the Court expressed its doubts that VAMC could be both a defendant and the enterprise. Before that, on November 22, 1993, plaintiffs maintained that VAMC was "both a person and an enterprise under RICO." (Plaintiff's Opposition, p. 13).

or continuity of such an enterprise was presented to the jury; the jury never found that such an enterprise existed.

4. *Ascertainable structure.*

Defendants also argue that plaintiffs failed to prove an enterprise with an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity. That argument is without merit.

The Supreme Court has explained that a RICO " 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *United States v. Turkette,* 101 S.Ct. 2524, 2528 (1981). The *Turkette* Court did not, however, explicitly specify the quantum of structure necessary to constitute a RICO enterprise. Fortunately, the Ninth Circuit has recently elaborated on the "structure" requirement:

> It . . . is not necessary to show that the organization "has some function wholly unrelated to the racketeering activity." (*United States v. Riccobene,* 709 F.2d 214, 223-24 (3d Cir.) (as amended), *cert. denied,* 104 S.Ct. 157 (1983)). Rather, it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering. *Id.* at 224.

Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996).

The evidence in the instant case met this standard. There was considerable proof of VAMC's structure beyond the racketeering activity itself.[4] *Compare United States v. Feldman,* 853 F.2d 648, 660 (9th Cir. 1988); and *United Energy*

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[4]For example, the parties' "Statement to he Jury Re: Stipulated Facts" sets forth that VAMC is a New York Corporation formed in 1969; that VAMC renders accounting and business management services to clients, including plaintiffs; and that VAMC has offices in New York, Connecticut, and Beverly Hills and employs a staff of about 18.

Owners v. United Energy Management, 837 F.2d 356, 363 (9th Cir. 1988) (sufficient structure apart from racketeering activity, as measured by majority rule subsequently adopted by *Chang*); *with Chang*, 80 F.3d at 1300 (insufficient structure apart from racketeering activity).

C. *Defendants' other arguments*

All of defendants' other arguments are without merit.

1. *Scienter*

Defendants contend that there was insufficient evidentiary support for the scienter required under the mail and wire fraud predicate acts. The requirement of specific intent in those predicate acts can be satisfied by "the existence of a scheme which was reasonably calculated to deceive persons of ordinary prudence and comprehension and this intention is shown by examining the scheme itself." *United States v. Green*, 745 F.2d 1205, 1207 (9th Cir. 1984).

The Court finds that "a scheme reasonably calculated to deceive persons of ordinary prudence" was adequately supported by the evidence. The evidence showed that defendants approached plaintiffs and offered to invest their earnings and keep their books in exchange for five percent of their overall income.[5] Defendants then advised plaintiffs to invest in partnerships in which defendants had undisclosed financial interests.

Defendants have not demonstrated that the evidence would reasonably permit only a conclusion against the

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[5]The Court rejects defendants' contention that this oral promise was the only evidence of misrepresentation, and that it should have been barred by the parol evidence rule. The evidence supported a fraudulent scheme broader than the oral misrepresentations. The scheme involved the failure to disclose material information regarding defendants' conflicts of interest with respect to several investments over many years.

requisite level of scienter, nor that the finding of scienter was against the clear weight of the evidence.

2. *Robert Andrews' participation in the VAMC enterprise*

Defendants also contend that, even if an enterprise were shown by the evidence, that Robert Andrews could not be liable under section 1962(c) because he did not participate in the "operation or management of the enterprise itself." *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1172 (1993).

The Court disagrees, and finds that there was sufficient evidence to support the jury's finding that Robert Andrews was involved in the operation and management of VAMC. He and Vince were the only shareholders. Robert was part of the upper-management of VAMC: he had been an officer since the 1970's, serving as the Vice-President and Secretary. (See Statement to the Jury Re Stipulated Facts). Further, Robert held an official position in several of the partnerships that he recommended to Vince for VAMC's clients.

The mere fact that Robert Andrews did not know which clients' investments went to which partnership, or that he never told Vince precisely how to advise their clients, does not negate the jury's factual finding that he participated in the operation or management of the enterprise through a fraudulent scheme. Robert need not have had total control of every aspect of VAMC to have satisfied the "operation or management" test. *See Reves*, 113 S.Ct. at 1173 ("An enterprise in 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management").

3. *Pattern of racketeering activity*

To satisfy the requirement of a "pattern of rackateering activity," a plaintiff must show that the alleged predicate acts are (1) related to each other, and (2) amount to a

continued criminal activity. *See H.J. Inc. v. Northwestern Bell Tel. Co.,* 109 S.Ct. 2893, 2901 (1989). Defendants argue that the second element, the "continuity" requirement, was not met.

The evidence showed that defendants had a long-term financial association with both plaintiffs. Between 1968 and 1987, plaintiffs entered into 55 written contracts (42 for Pincay, 13 for McCarron) through which they purchased limited partnership interests offered to them by VAMC and Vincent Andrews, Jr. Defendants had financial interests in many of the partnerships at the times it recommended them to plaintiffs.

Contrary to defendants' assertions, no authority requires that clients other than plaintiffs must have been defrauded in order to support a finding of the requisite "continuity." The evidence adequately supported the jury's finding of a "pattern of racketeering activity" by defendants with respect to plaintiffs alone.

4. *Proximate causation of damages*

The proper measure of a prevailing plaintiffs' RICO damages is the harm "directly" or "proximately" caused by the alleged RICO violations. *See Holmes v. Sec. Investors Protection Corp.,* 112 S.Ct. 1311, 1317-18 (1992). Defendants contend that the damages awarded here were, as a matter of law, not proximately caused by the predicate acts.

The Court disagrees, and finds that there was sufficient evidence to proximate cause between the alleged misrepresentations by defendants and plaintiffs' damages. Plaintiffs were the direct objects of defendants' various misrepresentations, they were not injured third-parties, as in *Holmes.* There was evidence showing that defendant's alleged fraudulent acts proximately induced plaintiffs to invest in numer-

ous partnerships in which defendants had a financial interest.[6]

5. *Statute of limitations*

The statute of limitations period for civil RICO claim is four years. *See Agency Holding Corp. v. Malley-Duffy & Assoc.*, 107 S.Ct. 2759, 2767 (1987). A RICO claim accrues when the plaintiff knew or had reason to know of the injury that is the basis of the action. *See Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988). Defendants, relying primarily on *Volk v. D.A. David-*

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[6]Defendants urge the Court to impose the proximate causation rule articulated by the Fifth Circuit with respect to an alleged violation of Rule 10b-5 of the Securities Exchange Act. The Fifth Circuit has stated that:

> The plaintiff must prove not only that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss. The causation requirement is satisfied in a Rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment's decline in value. If the investment decision is induced by misrepresentations or omissions that are material and that were relied on by the claimant, but are not the proximate reason for his pecuniary loss, recovery under the Rule is not permitted.

Huddleston v. Herman & McLean, 640 F2d 534, 549 (5th Cir. 1981), *aff'd in relevant part, rev'd in part*, 459 U.S. 375 (1982).

Huddleston, however, addressed Rule 10b-5, and has never been applied by the Ninth Circuit to RICO actions. Moreover, the Ninth Circuit declined to apply the *Huddleston* rule to a Rule 10b-5 "churning case," in which the defendant's liability arose from its recommending purchases in order to generate commissions, not from its inducing purchases for more than the stocks were worth. The court reasoned that the plaintiff "should not have to prove loss causation where the evil is not the price the investor paid for a security, but the broker's fraudulent inducement of the investor to purchase the security." *Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 773 (9th Cir. 1984).

The court declines to apply the *Huddleston* rule here.

son & Co., 816 F.2d 1406 (9th Cir. 1987), contend that the evidence showed that plaintiffs had reason to know of their claims long before four years prior to the time their cases were filed.[7]

Volk, however, is distinguishable.[8] In the instant case, the documents that plaintiffs received never disclosed the full scope of the conflicts of interest nor the possible adverse consequences for plaintiffs as investors. Moreover there were fiduciary aspects to the relationship between plaintiffs and defendants in the instant case which were not raised in *Volk*. The existence of a fiduciary relationship is relevant because, as the Ninth Circuit has explained, "[p]assive concealment of information is not enough to toll the statute of limitations unless the defendant had a fiduciary duty to disclose information to the plaintiff." *Conmar Corp. v. Mitsui & Co.*

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[7]Defendants note that plaintiff Pincay testified that in 1978 he noticed from a document that Andrews & Company, which he understood to involve Vincent Andrews, was the managing partner of one of the partnerships. (Tr. 89). Pincay also acknowledged that he read a one-page acknowledgment of compensation form for Taber Mill in 1980, disclosing Robert Andrew's compensation. (Tr. 93). Plaintiff McCarron testified that he had a "standard practice" of reading documents sent to him by VAMC (Tr. 220), and that the second partnership document he received referred to Robert Andrew's interest in the partnership. (Tr. 231.)

[8]In *Volk*, 816 F.2d at 1409-12, the plaintiffs had invested in various limited partnerships, each organized to acquire and develop coal leases in Utah. Those partnership interests were marketed as tax shelters. In an annual report sent to plaintiffs, the general partner disclosed that the partnership properties contained less coal reserves than originally represented, and that the IRS had questioned the commercial viability of the mining operations, such that the propriety of certain favorable tax deductions was jeopordized. The report explained the details of the problem and a broad scope of consequences to the investors. The Ninth Circuit held that receipt of the report gave the *Volk* plaintiffs constructive knowledge of their fraud claims.

(U.S.A.). Inc. 858 F.2d 499, 505 (9th Cir. 1988) (citations omitted), *cert. denied.* 109 S.Ct. 795.[9]

Given the circumstances in this case — in particular the type of relationship that plaintiffs and defendants shared the subtle manner that defendants' interests were "disclosed" to plaintiffs and defendants' reassurances to plaintiffs — the Court concludes that plaintiffs' claim did not, as a matter of law, accrue upon their first learning that defendants held an interest in a recommended investment. The jury could have reasonably found that the plaintiffs' RICO claims were not time-barred.

6. *Damage calculations*

Defendants contend that a new trial is justified with respect to damages for two reasons. Neither is persuasive.

a. *Present value of partnerships*

Defendants content that plaintiffs claims of the illiquidity of their investments were factually wrong and legally irrelevant. Furthermore, they argue that even if the investments were illiquid, the partnerships still had value, the present value of which should have been taken into account in the damages calculation.

Plaintiffs persuasively respond that defendants had an opportunity to present evidence of the value of the partnerships at trial. Moreover, defendants' own witnesses Michael Fried and John Wairweiss testified that the investments

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[9]*Conmar,* 858 F.2d 499, was not a RICO case. There is no Ninth Circuit law that establishes the standard for "knowledge" to be applied in a statute of limitations analysis of a RICO claim, where the plaintiff had a fiduciary relationship with defendants and placed substantial trust and confidence in them. There is no binding authority, then, on whether the requisite "knowledge" needs to be knowledge of facts amounting to "pervasive fraud," as plaintiffs argue, or merely of facts that defendants had a stake in the investments.

were illiquid and that they could not specify a place where the investments could be sold. In addition, Vincent Andrew testified that he had told plaintiffs that their investments were not "readily saleable" and not liquid.

The Court finds that the jury's assessment of the partnerships' value was not clearly erroneous or against the clear weight of the evidence.

b. *Tax benefits*

Next, defendants contend that evidence of plaintiffs' tax benefits should have been considered in the damages calculation, particularly because the tax benefits were part of the motivation for plaintiffs' investments.

In *Randall v. Loftsgaarden,* 106 S.Ct. 3143, 3149 (1986), the Supreme Court held that section 12(2) of the Securities Exchange Act, in providing for an offset of "income received" on a security against money returned to a plaintiff, does not "encompass the tax benefits received by defrauded investors by virtue of their ownership of the security, because such benefits cannot, under any reasonable definition, be termed 'income.' " *See also Fleischauer v. Feltner,* 87 F.2d 1290, 1300-1301 (6th Cir. 1989), *cert. denied* 493 U.S. 1074 (1989).

Defendants argue that *Randall* is distinguishable because that case involved an interpretation of a statute's definition of "income received" and the calculation of a rescissionary measure of damages, as opposed to the compensatory damages at issue here. The Ninth Circuit has not decided whether, after *Randall,* RICO compensatory damage awards should be reduced by tax benefits received. In the absence of such precedent, the Court declines to grant judgment as a matter of law or a new trial on this ground.[10]

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[10]Defendants cite cases outside the Ninth Circuit that arguably support their position that plaintiffs' damages should have been offset by

7. Other evidentiary rulings

Defendants next contend that two purportedly erroneous evidentiary rulings warrant a new trial.

First, defendants argue that they were improperly prevented from presenting evidence regarding plaintiffs' other business dealings and their overall financial picture. The Court finds that such evidence was properly excluded as irrelevant to the conduct at issue. *See* Fed. R. Evid. 401, 402.

Defendants also contend that the Court erred in permitting plaintiffs' expert witness Costello to attend trial. *See* Fed. R. Evid. 615. Even assuming that Costello should have

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tax benefits received. In *Salcer v. Envicon Equities,* 744 F.2d 935, 940-42 (2d Cir. 1984), the court stated that tax benefits received from limited partnerships must be deducted in calculating damages. *Salcer,* however, was decided before *Randall,* and the holding was specifically vacated by the Supreme Court and remanded in light of *Randall.*

Burdett v. Miller, 957 F.2d 1375, 1383 (7th Cir. 1992), is more helpful to defendants. It held that when seeking damages arising from a fiduciary's breach of duty with respect to tax shelters, a damage award cannot include the "anticipated, and realized, tax benefits of the tax shelters. . . . The essential point is that with regard to benefits of whatever sort that are promised and received, there is no injury, so no basis for a claim of damages."

Burdett was, by its own concession, a departure from the general rule that potential tax effects are irrelevant to damage calculations. *See id.* at 1383.

Burdett has not been followed in the Ninth Circuit. Moreover, the Ninth Circuit in *Volk* concluded that RICO does not provide plaintiffs with a means for recovering lost tax savings which were expected from limited partnership tax shelters. The court explained that *what was sold to investors were not tax savings,* and that *the predicate acts,* the securities violations *did not cause the loss of tax benefits. Volk,* 816 F.2d at 1415. That reasoning suggests that defendants may not claim tax savings as an offset to a RICO damages award.

been excluded, the Court finds defendants' conclusory allegation of prejudice unconvincing.

8. *Jury confusion*

Defendant's final contention is that the jury's findings were confused, and demonstrated that the jury failed to properly consider the evidence or follow the Court's instructions.

When a party challenges a jury verdict, the Court, in reviewing the verdict, has a "duty to reconcile the jury's special verdict responses on any reasonable theory consistent with the evidence." *Ortiz v. Bank of American National Trust & Savings Ass'n,* 852 F.2d 383, 388 (9th Cir. 1988) (holding that special verdict did not reflect "hopeless conflict or confusion").

Here, the jury found that plaintiff Pinoay would not have invested in certain partnerships if he had known of concealed facts. The selection of only those certain partnerships is reasonably consistent with the evidence. Similarly, the jury's finding of both negligent and intentional misrepresentation is not, as defendants contend, "blatantly inconsistent." Defendants made many representations, with respect to numerous transactions, over many years. It is not implausible that the jury found defendants both negligent and intentional in their misrepresentations.

The Court denies defendants' request for a new trial based on jury confusion.

IV.

CONCLUSION

Defendants' motion for judgment as a matter of law is GRANTED with respect to defendant VAMC on plaintiffs' RICO claim. The Court does not rule with respect to the RICO claim against the other two defendants.

Defendants' motion is DENIED in all other respects.

The Court orders a conference call with the parties on Tuesday, July 9, 1996 at 2:00 p.m., and may thereafter set a briefing schedule on two issues: (1) whether the dismissal of defendant VAMC from plaintiffs' RICO claim necessitates either judgment for the other defendants as a matter of law on the RICO claim, or a partial new trial; and (2) whether plaintiffs' prior election of RICO remedies may now be revoked. The Court will place the conference call.

Date: June 28, 1996 /s/ WM. MATTHEW BYRNE, JR.

Wm. Matthew Byrne, Jr.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAFFIT PINCAY, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-1445-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	ORDER
	)	GRANTING
	)	PLAINTIFF'S
	)	MOTION
Defendants.	)	FOR
	)	RECONSIDERATION
	)	
CHRISTOPHER J. MCCARRON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-4965-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	
Defendants.	)	
	)	

Filed
Clerk, U.S. District Court
August 15, 1997
Central District of California
By Deputy

Entered
Clerk, U.S. District Court
August 18, 1997
Central District of California
By Deputy

I.

BACKGROUND

These consolidated actions arose out of plaintiffs' claims of misconduct by their longtime business managers and financial advisors in connection with the investment of plaintiffs' funds in a series of limited partnerships. The jury returned a special verdict in favor of all of plaintiffs' claims, including a federal RICO claim and state law claims for breach of fiduciary duty, breach of oral agreement, negligence, fraud, and negligent misrepresentation. The Court entered the judgment in favor of plaintiffs Laffit Pincay ("Pincay") and Christopher J. McCarron ("McCarron").

Defendants Vincent Andrews, Jr., Vincent Andrews Management Corp. ("VAMC"), and Robert L. Andrews then moved for judgment as a matter of law or, alternatively, for a new trial. Before the Court ruled on the motion, the action was stayed pending defendants' bankruptcy proceedings. After the bankruptcy stays were lifted, the Court granted VAMC judgment as a matter of law on plaintiffs' RICO claim and denied defendants' motion in all other respects.

Plaintiffs now move for reconsideration of that decision. The parties have briefed other post-trial issues, including whether the individual defendants are entitled to a new trial or judgment as a matter of law in light of the judgment for VAMC and whether plaintiffs' election of RICO remedies should be considered binding.

II.

MOTION FOR RECONSIDERATION

A. *Legal Standard*

Reconsideration is generally a matter for the discretion of the Court, *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th

Cir. 1991). It is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. *School District No. 10, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A court may reconsider an interlocutory order at any time. *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 907 F.Supp. 1349, 1353 (N.D. Cal. 1995) ("Reconsideration is justified if . . . there is a need to correct clear error or to prevent manifest injustice.").

In this case, plaintiffs argue that the Court's decision to grant judgment as a matter of law to VAMC was clearly erroneous. Because no final judgment has been issued for VAMC, the Court's decision was an interlocutory one. *See id.*

B. *Discussion*

Robert Andrews, Vincent Andrews, and VAMC are liable under the RICO statute if they were associated with "any enterprise" engaged in interstate commerce to conduct or participate "directly or indirectly" in the conduct of the enterprise's affairs through a pattern of racketeering. 18 U.S.C. § 1962(c). In the Pre-Trial Conference Order, plaintiffs identified VAMC as the only RICO enterprise involved in the case. The Ninth Circuit has held that a RICO enterprise cannot also be a defendant in a § 1962(c) RICO claim; the "enterprise" itself cannot also be a person who participated in the enterprise. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992); *Rae v. Union Bank*, 725 F.2d 478, 480-81 (9th Cir. 1984). The Court has ruled that "VAMC cannot, as a matter of law, be liable as a 'person' under § 1962(c) . . VAMC is entitled to judgment as a matter of law on plaintiff's RICO claim." (June 29, 1996, Order at 5.)

Plaintiffs do not dispute that VAMC could not be a RICO enterprise and a defendant in the case. However, they argue that judgment should be reinstated against VAMC based upon another RICO enterprise theory. Plaintiffs now contend that they presented evidence to the jury of a RICO enterprise composed of an association-in-fact of VAMC, Vincent Andrews, and Robert Andrews. Plaintiffs argue that the jury instructions and verdict indicate that the jury was presented with and persuaded by this association-in-fact theory.

Where "[f]acts supporting the court's findings and conclusions were before the court and were argued . . . [a] court properly may consider the pleadings and pretrial order to have been amended to conform to the evidence presented." *Sauers v. Alaska Barge* 600 F.2d 238, 244 (9th Cir. 1979). However, in its June 29 Order, the Court concluded that

> [p]laintiff's request to amend the Pretrial Conference Order to describe an enterprise consisting of both VAMC and the Andrews defendants is denied. No evidence of the structure or continuity of such an enterprise was presented to the jury; the jury never found that such an enterprise existed.

(June 29, 1996, Order at 7-8.).

Plaintiffs have identified new support for their argument. They contend that the jury instructions given by the Court indicate that they presented the association-in-fact theory to the jury. They have also identified portions of the closing arguments discussing their RICO claim in support of their contention. The jury was instructed that

> Plaintiffs contend that defendant Vincent Andrews Management Corporation was both a person liable under RICO and an enterprise which affect interstate or foreign commerce, and that defendants Robert Andrews and Vincent Andrews participated in this enter-

> prise through a pattern of racketeering activity. *Plaintiffs also claim that all three defendants were associated-in-fact as an enterprise that affected interstate or foreign commerce, and that all three defendants participated in this enterprise through a pattern of related activity.* Defendants deny these contentions.

(emphasis added).

The court has an obligation to read the verdict harmoniously with the jury instructions given. *Interstate Markings, Inc., v. Mingus Constructors, Inc.*, 941 F.2d 1010, 1013 (9th Cir. 1991). It must draw all possible inferences in favor of the jury's verdict and findings, *Donoghue v. Orange County*, 848 F.2d 926, 932 (9th Cir. 1988) (motion for directed verdict).

C. *Elements of Plaintiffs' RICO Claim*

To establish a RICO claim, plaintiffs were obligated to prove "1) that the defendant[s], 2) through the commission of two or more acts, 3) constituting a 'pattern,' 4) of 'racketeering activity,' 5) directly or indirectly invest[ed] in, or maintain[ed] an interest in, or participate[d] in, 6) an 'enterprise,' 7) the activities of which affect[ed] interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2nd Cir. 1983).

1. *Predicate Acts*

Plaintiffs argue that the predicate acts committed here were the investment recommendations made to them by defendants without disclosure of defendants' partnership interests. They contend that more than two of these recommendations were made in violation of the mail and wire fraud statutes.

2. *Pattern*

Plaintiffs had to establish that the acts constituted a "pattern," which has been interpreted by the Ninth Circuit

to create a test whether the acts of the defendants were related and posed a threat of continuing activity. *Ikuno v. Yip,* 912 F.2d 306, 309 (9th Cir. 1990); *Sun Sav. & Loan Ass'n v. Dierdorf,* 825 F.2d 187, 192 (9th Cir. 1987).

The evidence showed that defendants had a financial relationship with both plaintiffs that lasted for two decades. That relationship extended to a number of ventures in which defendants had financial interests at the time they recommended them to plaintiffs.[1] Plaintiffs presented evidence at trial that defendants failed to adequately disclose those interests to them. These recommendations were made in a similar fashion and continued over the course of a number of years.

Plaintiffs presented their pattern argument to the jury. In their closing argument, plaintiffs contended

> there has to be a pattern. Here we have a pattern in Laffit's case of over 18 years, a pattern I would submit to you is very clear. It was here. There was knowingly an attempt to deceive.

(Transcript, July 29, 1992, at 32.). Plaintiffs satisfied the pattern element of their claim.

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[1]For example, the Pre-Trial Conference Order states that VAMC was compensated for performing accounting services and had a wholly-owned subsidia serve as a general partner for one of the partnerships in which plaintiffs invested. (Pre-Trial Conference Order, at 16-17, 23.) Robert Andrews and companies owned by him received fees from or participated in various limited partnerships. (Pre-Trial Conference Order, at 5, 9-11, 14-15. 20-24, 26-32, and 34-37.) Vincent Andrews also made money in various partnerships with the plaintiffs as a limited partner, a general partner, and a president or stockholder of corporate general partners. (Pre-Trial Conference Order, at 4, 9, 11-12, 14, 17-21, 25, and 33-34.).

3. *Racketeering Activity*

For RICO purposes, the term "racketeering activity" incudes a broad assortment of federal crimes, including the acts of mail and wire fraud alleged here. 18 U.S.C. § 1961(1)(B).

The mail and wire fraud statutes provide that anyone who devises "any scheme or artifice . . . for obtaining money or property by means of false or fraudulent pretenses, representations, or promises and uses the mail or wires to do so shall be fined not more than $1,000 or imprisoned for not more than five years, or both. 18 U.S.C. §§ 1341, 1343. Plaintiffs presented evidence to the jury that defendants presented investment opportunities to plaintiffs over the telephone and through the mails without disclosing their financial interests in those investments. The jury could have concluded that this evidence met the requirements set forth in the mail and wire fraud statutes.

To the extent that plaintiffs established that defendants committed mail and wire fraud, they have satisfied the racketeering element of the claim.

4. *Enterprise*

RICO defines "enterprise to "includ[e] . . . any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). To establish the existence of an association-in-fact enterprise, plaintiffs had to establish that the members of the enterprise "share[d] a common purpose of engaging in a course of conduct" and produce "evidence of an ongoing organization, formal or informal, and . . . that the various associates function[ed] as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Plaintiffs presented their association-in-fact argument to the jury, albeit confusingly, in their closing argu-

ment. With regard to "evidence of an ongoing organization," plaintiffs argued that

> [t]he people have to be employed by or in association with the enterprise. Well, there is no doubt about that, VAMC's relationship with Robert and with Vinny and the association with the conspiracy.

(Transcript, July 29, 1992, at 32.). Though plaintiffs initially observed that the association was somehow separate from the enterprise, by analyzing the agreement with the three defendants as a "relationship" and an "association" plaintiffs presented evidence of an association-in-fact to the jury in accordance with the jury instructions.

Plaintiffs also argued that

> VAMC was the vehicle that was used for all of these transactions. That is, they acted independently as a group. That sounds like it is a contradiction, but VAMC acted through Vinny, through Robert, and they acted themselves.

(Transcript, July 29, 1992, at 35.).[2] Here, plaintiffs described each of the three defendants as independent actors operating with one another. Each defendant "acted independently," but as a whole, they operated "as a group." Plaintiff's closing argument identified their association-in-fact claim of an ongoing, informal enterprise comprised of VAMC and its officers for the jury.

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[2]Enterprises composed of a corporation and its officers are not without precedent in the Ninth Circuit. The circuit has held that individual officers of a corporation can form an association-in-fact with the corporation. *U.S. v. Feldman,* 853 F.2d 648, 655-56 (9th Cir. 1988). Nor must the corporation be devoted entirely to illegal ends to do so. A corporate member of an association-in-fact "may be entirely legitimate and need not benefit from the racketeering." *Id.* at 657.

Plaintiffs also had to also show that the enterprise existed "separate and apart from the pattern of activity in which it engages" to prove their association-in-fact claim. *Turkette,* 452 U.S. at 583. To establish separate existence,

> it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering .... The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.

Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996). The Ninth Circuit has held that an association-in-fact of corporate entities and their officers has an ascertainable structure separate from racketeering. *United States v. Feldman,* 853 F.2d 648, 660 (9th Cir. 1988) (because corporation has a legal existence separate from its participation in racketeering, "the very existence of a corporation meets the requirement for a separate structure").[3]

Plaintiffs' closing argument referred to the separate existence of the enterprise and its activities other than those involving plaintiffs.

> Obviously, they talked with each other, *with other persons,* with themselves, with the plaintiffs, and there has to be a pattern.

(Transcript, July 29, 1992, at 32.) (emphasis added). Plaintiffs presented evidence to the jury from which it could

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[3]Plaintiffs observe that the Pre-Trial Conference Order established that the individuals involved in the conspiracy carried out functions in its furtherance separate from their corporate functions. That order stated that "Robert Andrews has been involved in finance and real estate since the middle '70's. These are separate endeavors from VAMC." (Pre-Trial Conference Order, at 5.).

conclude that the association-in-fact had a separate existence apart from the pattern on activity in which it engaged.

5. *Participation*

Section 1962(c) prohibits persons employed by or associated with an enterprise from conducting or participating in the conduct of the affairs of that enterprise through a pattern of racketeering activity. To prove participation, plaintiffs had to demonstrate the existence of a relationship between the pattern of racketeering activity and the enterprise. This nexus exists "when 1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or 2) the predicate offenses are related to the activities of the enterprise." *United States v. Sciotto,* 641 F.2d 47, 54 (2nd Cir. 1981); *Dierdorff,* 825 F.2d, at 195 (quoting *Sciotto*).

Defendants located and sold investment opportunities to plaintiffs without disclosing their interests in those investments. Those predicate offenses were related to the activities of the enterprise, which located and sold investments for a number of different clients, including plaintiffs.

6. *Interstate Commerce*

Finally, plaintiffs had to show that the racketeering activity must have some effect on interstate commerce. 18 U.S.C. § 1962(c). Plaintiffs presented evidence to the jury outlining the multistate investments made by plaintiffs with defendants' advice. In their closing argument, plaintiffs observed that

> [i]nterstate commerce just means you use the mails. You use the telephone. We have already been through that. I don't think there is any doubt about that. They certainly did business in more than one state. You heard them say they were in New York and Connecti-

> cut, and they were out here in California, and these businesses are in various other states.

(Transcript, July 29, 1992, at 31-32.) Plaintiff satisfied the interstate commerce element of the RICO offense.

D. *Conclusion*

In light of the jury instructions, the evidence presented by plaintiffs, and the closing argument delivered by their counsel, the Court's decision to grant judgment as a matter of law to defendant VAMC constituted clear error. *ACandS, Inc.*, 5 F.3d at 1263. Because the Court must read the verdict harmoniously with the jury instructions given and draw all possible inferences in favor of the jury's verdict and findings, plaintiff's motion for reconsideration is granted. *Mingus Constructors*, 941 F.2d at 1013; *Donoghue*, 848 F.2d at 932. The portion of the Court's June 29, 1996 Order granting judgment as a matter of law to defendants on plaintiffs' RICO claim is hereby vacated.

III.

JUDGMENT AS A MATTER OF LAW FOR ROBERT AND VINCENT ANDREWS

Defendants' motion for judgment as a matter of law as to Robert and Vincent Andrews was predicated on the dismissal of VAMC as a defendant. The Court has reconsidered that dismissal and finds that plaintiffs did present evidence of an association-in-fact RICO enterprise composed of the Andrews brothers and VAMC.

"Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is." *Garrison v. U.S.*, 62 F.2d 41, 42 (4th Cir. 1932); 9A Wright & Miller, *Federal Practice and Procedure* § 2531.

The standard for granting a directed verdict under Rule 50(a) mirrors the standard for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Robert and Vincent Andrews are liable under the RICO statute if they were associated with "any enterprises" engaged in interstate commerce to conduct or participate "directly or indirectly" in the conduct of the enterprise's affairs through a pattern of racketeering. 18 U.S.C. § 1962(c). The jury found, after considering the evidence, that the Andrews brothers were associated in fact with VAMC and that that enterprise engaged in racketeering activity. Substantial evidence supported that finding. Defendants had a long-term financial association with both plaintiffs. Between 1968 and 1987, plaintiffs entered into 55 written contracts (42 for Pincay, 13 for McCarron) through which they purchased limited partnership interests offered to them by VAMC and Vincent Andrews. Defendants had financial interests in many of the partnerships at the time they were recommended to plaintiffs.

Defendant's motion for judgement as a matter of law is denied.

IV

MOTION FOR A NEW TRIAL FOR ROBERT AND VINCENT ANDREWS

Because defendants' motion for a new trial was also predicated on the dismissal of VAMC as a defendant, it is also denied. "Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice." *Garrison v. U.S.*, 62 F.2d 41, 42 (4th Cir. 1932); 9A Wright & Miller, *Federal Practice and Procedure* § 2531.

The jury concluded that a RICO enterprise composed of the three defendants existed as an association-in-fact. That verdict was not contrary to the clear weight of the evidence and did not constitute a miscarriage of justice.

V.

ELECTION OF REMEDIES

Defendants argue that plaintiffs' election of RICO remedies before the resolution of the post-trial issues ought to be considered binding upon them now. However, "it ought to be obvious that, when a plaintiff erroneously thinks that a certain remedy is available to him, his futile attempt to procure it by legal proceedings ought not to be described as an election between alternative remedies. . . ." *Warren Company v. Neel,* 184 F. Supp. 203, 212 (W.D. Ark. 1968).[4] This is particularly so in the context of RICO, because RICO remedies are cumulative and supplemental to common law remedies. *Arabian American Oil Co. v. Scarfone,* 939 F.2d 1472, 1478 (11th Cir. 1991)

Plaintiffs' election of RICO remedies is not binding. They may within fifteen (15) days make a new election of remedies in light of this Order if they desire.

Date: Aug 13, 1997 /s/ WM. MATTHEW BYRNE, JR.
Wm. Matthew Byrne, Jr.
United States District Judge

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[4] Cases holding parties to binding elections of remedies are rare. In California, "the doctrine of election of remedies . . . has been repeatedly criticized and seems to be falling into disfavor. Late California decisions illustrating binding election are comparatively rare. . . ." 3 Witkin, *California Procedure* § 132, p.160.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 USCS § 1961 (1990)

§ 1961. Definitions

As used in this chapter [*18 USC §§ 1961* et seq.]—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a narcotic or other dangerous drugs (as defined in section 102 of the Controlled Substances Act [*21 USCS § 802]*), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1543 (relating to forgery or

false use of passport), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), 2251, 2251A, 2252, and 2258 (relating to sexual exploitation of children), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) an act which is indictable under title *29, United States Code, section 186* (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [*21 USCS § 802]*), punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union of group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the Untied States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [*18 USCS §§ 1961* et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [*18 USCS §§ 1961* et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [*18 USCS §§ 1961* et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [*18 USCS §§ 1961* et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [*18 USCS §§ 1961* et seq.] either the investigative provisions of this chapter [*18 USCS §§ 1961* et seq.] or the investigative power of such department or agency otherwise conferred by law.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART 1. CRIMES

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 USCS § 1962 (1988)

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open

market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any one person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 USCS § 1964 (1984)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [*18 USCS §§ 1961* et

seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 USCS § 1965 (1970)

§ 1965 Venue and process

(a) Any civil action or proceeding under this chapter [*18 USCS §§ 1961* et seq.] against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that ends of justice require that other parties residing in any other district brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter [*18 USCS §§ 1961* et seq.] in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court

is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter [*18 USCS §§ 1961* et seq.] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 63. MAIL FRAUD

18 USCS § 1341 (1990)

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property, by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Office, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned nor more than 30 years, or both.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 63. MAIL FRAUD

18 USCS § 1343

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writing, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

F-1

September , 1972

Irving Gilbert
289 Bayberry Drive
Hewlett Harbor, N.Y. 11557

Michael D. Dowd, Jr. & Genevieve Dowd
57 Crosby Brown Road
Gladwynne, Pa.

Wm. B. Farrell, Jr.
130 Hollywood Avenue
Englewood Cliffs, New Jersey 07632

Laffit Pincay, Jr. & Linda Pincay
1167 W. Duarte Road
Arcadia, California

Gentlemen:

This letter sets forth the terms and conditions of our understanding with respect to the division and sharing of monies or other property receivable by you as the Class B limited partners from Boca Raton Associates, a general partnership, of which is a general partner and of which you are the four Class B limited partners.

You, jointly and severally, hereby agree with the undersigned, Andrews & Company, a partnership, as follows:

1. In consideration for financial services rendered to you by the undersigned in connection with the organization of, and your investment as Class B limited partners in, Boca Raton Associates, you agree to pay the undersigned, the following amounts:

(a) The first $500 of cash receipts distributed by Boca Raton Associates to the Class B limited partners in each calendar year; and

(b) 10% of all cash receipts distributed by Boca Raton Associates to the Class B limited partners in excess of $8,000 in each calendar year.

"Cash receipts" shall be deemed to mean cash distributed to all Class B limited partners by Boca Raton Associates irrespective of whether said distributions may be characterized as income, profit, capital or return of capital or otherwise for partnership reporting or tax purposes; provided, however, that if Boca Raton Associates shall make a distribution to Class B limited partners in property, for the purposes of this paragraph 1, said distribution shall be deemed to be in cash to the extent of the fair market value of such property at the time of distribution.

2. You agree to cause to be incorporated in the partnership agreement of Boca Raton Associates by amendment or otherwise a provision which shall acknowledge the amounts owed to the undersigned by Class B limited partners as set forth herein, the entitlement of the undersigned thereto, the irrevocable direction to the partnership and/or its general partner to pay such amount directly to the undersigned on your behalf. Said provision shall further provide that said amounts owed shall be a continuing obligation of the Class B limited partners, binding upon them, their respective successors, heirs or assigns.

If the foregoing states our agreement, please sign two of the four copies enclosed and return them to us. Please keep the original and one other signed copy for your use.

Very truly yours,
Andrews & Company

By /s/ VINCENT S. ANDREWS
Vincent S. Andrews

The foregoing correctly states our agreement:

/s/ IRVING GILBERT
Irving Gilbert

/s/ MICHAEL D. DOWD, JR.
Michael D. Dowd, Jr. and

/s/ GENEVIEVE DOWD
Genevieve Dowd

/s/ WM. B. FARRELL, JR.
Wm. B. Farrell, Jr.

/s/ LAFFIT PINCAY, JR.
Laffit Pincay, Jr. and

/s/ LINDA PINCAY
Linda Pincay

APPENDIX G

PARTNERSHIP AGREEMENT
of
FAIRVIEW ASSOCIATES

AGREEMENT made as of April 23, 1984, among the persons listed on Schedule "A" attached hereto, including Andrews & Company, Inc., the Managing Partner. The Managing Partner is a Connecticut corporation controlled by Robert Andrews.

1. NAME. The partnership (hereinafter the "Partnership") shall be conducted under the name of FAIRVIEW ASSOCIATES and shall be a partnership under the laws of the State of Connecticut.

2. CHARACTER. The purpose of the Partnership is to make investments in various ventures which, in the opinion of the Managing Partner, will provide the possibility of capital appreciation, income and tax benefits to the partners, each of whom is in a high income tax bracket. The Partnership shall initially invest in OLENTANGY COMMONS LIMITED PARTNERSHIP (an Ohio Limited Partnership) ("Olentangy") and in FRANKLIN PARK INVESTORS LIMITED PARTNERSHIP (a Michigan Limited Partnership) (the "Limited Partnership") ("Franklin Park"). The investments are described in the Confidential Investment Summary prepared with respect to each limited partnership, a copy of which, together with the accompanying documents, each partner acknowledges having received and read. As provided in the limited partnership agreements for the Limited Partnerships, the investments of the limited partners thereof are to be made in installments of approximately 24% on initial subscription, approximately 24% on February 1, 1985 and in reduced installments on February 1, 1986, 1987 and 1988. The Partnership intends to invest in Olentangy and Franklin Park respectively, in an approximate relationship of 45 to 55. Accordingly, the partners (other than the Managing Partner, which shall make no

capital contribution) shall, upon execution of this agreement, each contribute capital to the Partnership the amounts set forth in Schedule A and such additional amounts as the Managing Partner shall determine. Each partner (other than the Managing Pa tner) shall be personally liable to the Partnership for up to 3.1 times the initial contribution set forth opposite his name in Schedule "A" for recourse obligations of the Partnership to the Limited Partnerships. Each such partner agrees to contribute such required additional amount to the

(NOTE: PORTIONS OF THE AGREEMENT ARE OMITTED HERE. AGREEMENT CONTINUES ON THE NEXT PAGE)

(b) The Managing Partner shall be the attorney-in-fact for the Partnership and shall have full power and authority, subject to the provisions of subsection (d) of this Section 5, to take all action in connection with the Partnership affairs.

(c) The Managing Partner may, on behalf of the Partnership, employ attorneys, accountants and other independent contractors and personnel necessary to carry out the business of the Partnership.

(d) The Managing Partner may not, without the consent of all other partners, pledge or mortgage all or part of the Partnership property, sell, exchange, lease or otherwise dispose of all or any portion of the Partnership property (except by distribution thereof to the partners).

(e) No person, firm or corporation dealing with the Partnership shall be required to inquire into the authority of the Managing Partner to take any permitted action or make any permitted decision hereunder. Any person authorized to execute documents on behalf of the Managing Partner shall be authorized to execute any documents necessary to carry out the business of the Partnership.

(f) The Managing Partner shall be reimbursed by the Partnership for all reasonable out-of-pocket expenses incurred by or on behalf of the Partnership, including travel and related expenses. If the assets of the Partnership are insufficient to make such reimbursement, the partners (other than the Managing Partner) shall be obligated to contribute to the Partnership an amount sufficient therefor based upon their percentage ownership of the capital of the Partnership.

(g) The Managing Partner, for its services, shall receive a management fee of (i) 5% of the total contributions of the partners as made by them, and (ii) an amount equal to 10% of all distributions received from the Limited Partnerships in

excess of the amount of capital contributed to the Limited Partnerships by the Partnership.

(h) The partners acknowledge that neither the Managing Partner nor any other person on its behalf has made any representation concerning the investment to

(NOTE: REMAINDER OF AGREEMENT IS OMITTED HERE. SCHEDULE A, HOWEVER, IS ON THE NEXT PAGE)

SCHEDULE A

Contribution

Payments:

On Signing	$ 34,250.00
January 15, 1985	$ 34,000.00
January 15, 1986	$ 29,500.00
January 15, 1987	$ 24,250.00
January 15, 1988	$ 17,250.00
Total Contribution	$139,250.00

Signature, Name, Address and I. D. Number of Additional Partners

/s/ CHRISTOPHER J. MCCARRON
(Signature)

Christopher J. McCarron
(Print name)

2350 Flintridge Drive
(Street)

Glendale, CA 91206
(City and State)

SS# 014-48-5669
(I. D. Number)

APPENDIX H

PARTNERSHIP AGREEMENT
of
FAIRVIEW ASSOCIATES

AGREEMENT made as of April 23, 1984, among the persons listed on Schedule "A" attached hereto, including Andrews & Company, Inc., the Managing Partner. The Managing Partner is a Connecticut corporation controlled by Robert Andrews.

1. NAME. The partnership (hereinafter the "Partnership") shall be conducted under the name of FAIRVIEW ASSOCIATES and shall be a partnership under the laws of the State of Connecticut.

2. CHARACTER. The purpose of the Partnership is to make investments in various ventures which, in the opinion of the Managing Partner, will provide the possibility of capital appreciation, income and tax benefits to the partners, each of whom is in a high income tax bracket. The Partnership shall initially invest in OLENTANGY COMMONS LIMITED PARTNERSHIP (an Ohio Limited Partnership) ["Olentangy"] and in FRANKLIN PARK INVESTORS LIMITED PARTNERSHIP (a Michigan Limited Partnership) (the "Limited Partnerships") ("Franklin Park"). The investments are described in the Confidential Investment Summary prepared with respect to each limited partnership, a copy of which, together with the accompanying documents, each partner acknowledges having received and read. As provided in the limited partnership agreements for the Limited Partnerships, the investments of the limited partners thereof are to be made in installments of approximately 24% on initial subscription, approximately 24% on February 1, 1985 and in reduced installments on February 1, 1986, 1987 and 1988. The Partnership intends to invest in Olentangy and Franklin Park respectively, in an approximate relationship of 45 to 55. Accordingly, the partners (other than the Managing Partner, which shall make no

capital contribution) shall, upon execution of this agreement, each contribute capital to the Partnership the amounts set forth in Schedule A and such additional amounts as the Managing Partner shall determine. Each partner (other than the Managing Partner) shall be personally liable to the Partnership for up to 3.1 times the initial contribution set forth opposite his name in Schedule "A" for recourse obligations of the Partnership to the Limited Partnerships. Each such partner agrees to contribute such required additional amount to the

(NOTE: PORTIONS OF THE AGREEMENT ARE OMITTED HERE. AGREEMENT CONTINUES ON THE NEXT PAGE)

(b) The Managing Partner shall be the attorney-in-fact for the Partnership and shall have full power and authority, subject to the provisions of subsection (d) of this Section 5, to take all action in connection with the Partnership affairs.

(c) The Managing Partner may, on behalf of the Partnership, employ attorneys, accountants and other independent contractors and personnel necessary to carry out the business of the Partnership.

(d) The Managing Partner may not, without the consent of all other partners, pledge or mortgage all or part of the Partnership property, sell, exchange, lease or otherwise dispose of all or any portion of the Partnership property (except by distribution thereof to the partners).

(e) No person, firm or corporation dealing with the Partnership shall be required to inquire into the authority of the Managing Partner to take any permitted action or make any permitted decision hereunder. Any person authorized to execute documents on behalf of the Managing Partner shall be authorized to execute any documents necessary to carry out the business of the Partnership.

(f) The Managing Partner shall be reimbursed by the Partnership for all reasonable out-of-pocket expenses incurred by or on behalf of the Partnership, including travel and related expenses. If the assets of the Partnership are insufficient to make such reimbursement, the partners (other than the Managing Partner) shall be obligated to contribute to the Partnership an amount sufficient therefor based upon their percentage ownership of the capital of the Partnership.

(g) The Managing Partner, for its services, shall receive a management fee of (i) 5% of the total contributions of the partners as made by them, and (ii) an amount equal to 10% of all distributions received from the Limited Partnerships in

excess of the amount of capital contributed to the Limited Partnerships by the Partnership.

(h) The partners acknowledge that neither the Managing Partner nor any other person on its behalf has made any representation concerning the investment to

(NOTE: REMAINDER OF AGREEMENT IS OMITTED HERE. SCHEDULE A, HOWEVER, IS ON THE NEXT PAGE)

SCHEDULE A

Contribution

Payments:

On Signing	$ 34,250.00
January 15, 1985	$ 34,000.00
January 15, 1986	$ 29,500.00
January 15, 1987	$ 24,250.00
January 15, 1988	$ 17,250.00
Total Contribution	$139,250.00

Signature, Name, Address and I. D. Number of Additional Partners

/s/ LAFFIT PINCAY, JR.

(Signature)

Laffit Pincay, Jr.

(Print name)

2011 Cummings Drive

(Street)

Los Angeles, CA 90027

(City and State)

353-44-5009

(I. D. Number)

APPENDIX I

Taber Mill Company
c/o Related Housing Companies
Incorporated, General Partner
645 Fifth Avenue
New York, New York 10022

Re: Taber Mill Company

Gentlemen:

Robert Andrews, Esq. acted as my "Offeree Representative" (as that term is used in Rule 146 under the Securities Act of 1933) in connection with my purchase of a limited partnership interest in Taber Mill Company (the "Partnership"). The Offeree Representative has informed me that, except as set forth below, there are no material relationships between the Partnership or its affiliates and the Offeree Representative or his affiliates, which now exist or which are contemplated or which have existed at any time during the previous two years. The Offeree Representative has also informed me that, except as set forth below, no compensation has been received, or is to be received, as a result of such relationship.

Sincerely,

Residence Address:

5200 Los Grandes Way
Los Angeles, CA 90027

Dated: 5/30/80

/s/ Laffit Pincay Jr.
(Signature)

/s/ Linda Pincay
(Signature)

Laffit Pincay Jr. &
Linda Pincay
(Please Print Name)

Robert Andrews, (and persons and companies affiliated with Robert Andrews, collectively "Andrews") have assisted the Partnership in the placement of limited partner-

ship interests, Andrews will receive compensation from the Partnership with respect to their participation in the placement of such interests, such compensation to be in the amount of five percent (5%) of the capital contributions to be paid by such investors.

In the past Andrews has assisted in the placement of partnership interests in other similar partnerships for which Andrews received similar compensation. It is anticipated that in the future Andrews will act in a similar capacity with respect to other partnerships similar to the Partnership.

APPENDIX J

Taber Mill Company
c/o Related Housing Companies
Incorporated, General Partner
645 Fifth Avenue
New York, New York 10022

Re: Taber Mill Company

Gentlemen:

Robert Andrews, Esq. acted as my "Offeree Representative" (as that term is used in Rule 146 under the Securities Act of 1933) in connection with my purchase of a limited partnership interest in Taber Mill Company (the "Partnership"). The Offeree Representative has informed me that, except as set forth below, there are no material relationships between the Partnership or its affiliates and the Offeree Representative or his affiliates, which now exist or which are contemplated or which have existed at any time during the previous two years. The Offeree Representative has also informed me that, except as set forth below, no compensation has been received, or is to be received, as a result of such relationship.

Sincerely,

Residence Address:

1078 Linda Glenn Drive
Pasadena, CA 91105

Dated: 5/30/80

/s/ CHRISTOPHER J. MCCARRON
(Signature)

Christopher J. McCarron
(Please Print Name)

Robert Andrews, (and persons and companies affiliated with Robert Andrews, collectively "Andrews") have assisted the Partnership in the placement of limited partnership interests, Andrews will receive compensation from the Partnership with respect to their participation in the placement of such interests, such compensation to be in the

amount of five percent (5%) of the capital contributions to be paid by such investors.

In the past Andrews has assisted in the placement of partnership interests in other similar partnerships for which Andrews received similar compensation. It is anticipated that in the future Andrews will act in a similar capacity with respect to other partnerships similar to the Partnership.

No. 01-9

Supreme Court, U.S.
FILED
AUG 1 2001

IN THE

Supreme Court of the United States

LAFFIT PINCAY, JR., and CHRISTOPHER J. MCCARRON,

Petitioners,

—v.—

VINCENT S. ANDREWS, ROBERT ANDREWS, and VINCENT ANDREWS MANAGEMENT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID BOIES
Counsel of Record
ROBERT SILVER
ANDREW W. HAYES
WILLIAM D. MARSILLO
Counsel on the Petition
BOIES, SCHILLER & FLEXNER LLP
80 Business Park Drive
Armonk, New York 10504
(914) 273-9800

Counsel for Respondents

Question Presented

Whether, in an action alleging a scheme to defraud under 18 U.S.C. §§ 1961-1968, the Racketeer Influenced and Corrupt Organizations Act, the United States Court of Appeals for the Ninth Circuit properly held that the statute of limitations began to run when Petitioners received, reviewed, and signed express written disclosures where

(a) the written disclosures expressly stated that Respondents were receiving the compensation that Petitioners challenged in this case, *Pincay v. Andrews*, 238 F.3d 1106, 1107-08, 1110 (9th Cir. 2000); and

(b) the Ninth Circuit held that a clearer case of written disclosure sufficient for inquiry notice was "hard to imagine", *id.* at 1110.

Corporate Disclosure Statement

Pursuant to SUP. CT. R. 15 and 29.6, Respondent Vincent Andrews Management Corporation hereby states that it hás no parent corporations, and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

PAGE

Question Presented i

Corporate Disclosure Statement ii

Table of Authorities vi

Statement of the Case 1

Argument 4

I. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS' ARGUMENTS HERE WERE NEITHER PRESENTED TO NOR CONSIDERED BY THE NINTH CIRCUIT 4

II. PETITIONERS RELY ON MISSTATEMENTS OF THE RECORD BELOW AND CONTRADICT THEIR OWN TRIAL TESTIMONY 5

III. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT AND IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS 6

A. The Supreme Court Has Already Considered and Rejected Petitioners' Contentions Regarding Accrual 7

PAGE

B. The Petition is Improper and Should be Denied Because the Asserted Error Concerns the Manner in Which the Ninth Circuit Applied the Correct Rule of Law 9

C. No Court Has Ever Adopted a "No Bare Access" Accrual Rule as Petitioners Describe it and, in Fact, Petitioners' Authorities Undermine Their Contentions Here 10

CONCLUSION 16

APPENDIX A

Transcript of Proceedings, October 10, 1996 ..... 1A

Transcript of Proceedings, July 1, 1992 ..... 2A

Transcript of Proceedings, July 14, 1992 ..... 3A-5A

Transcript of Proceedings, July 17, 1992 ..... 6A-7A

Transcript of Proceedings, July 20, 1992 ..... 8A-9A

Transcript of Proceedings, July 15, 1992 ..... 10A-12A

PAGE

APPENDIX B

Partnership Agreement of Addison Associates dated August 12, 1980 ..... 1B-2B

Partnership Agreement of Fairview Associates dated April 23, 1984 ..... 3B-4B

May 30, 1980 Letter re: Taber Mill Company Partnership, signed by Pincay 5B-6B

May 30, 1980 Letter re: Taber Mill Company Partnership, signed by McCarron 7B-8B

APPENDIX C

Petitioner McCarron's Complaint, dated September 18, 1989 ..... 1C-2C

TABLE OF AUTHORITIES

Cases: PAGE

Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143 (1987) 8

Armstrong v. McAlpin, 699 F.2d 79 (2d Cir. 1983) 15

Beneficial Standard Life Ins. Co. v. Madriaga, 851 F.2d 271 (9th Cir. 1988) 15

Cooperativa De Ahorro y Credito Aguada v. Kiddder, Peabody & Co., 129 F.3d 222 (1st Cir. 1997) 15

Davidson v. Wilson, 973 F.2d 1391 (8th Cir. 1992) 11, 13, 15

Davis v. Birr, Wilson & Co., 839 F.2d 1369 (9th Cir. 1988)..... 15

Dodds v. Cigna Sec., Inc., 12 F.3d 346 (2d Cir. 1993) 15

Fujisawa Pharmaceutical Co. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997)..... 11, 12

Great Rivers Co-Op of S.E. Iowa v. Farmland Indus., 120 F.3d 893 (8th Cir. 1997) 11, 12, 13, 15

Hilton v. Munaw, 522 F.2d 588 (9th Cir. 1975).. 13

Hirschler v. GMD Investments Ltd. Partnership, Fed. Sec.L.Pep. ¶95,919 at 99,563 (E.D.Va. 1991) 15

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 6, 7, 8

PAGE

Luksch v. Latham, 675 F. Supp. 1198 (N.D. Cal. 1987) 10

McCool v. Strata Oil Co., 972 F.2d 1452 (7th Cir. 1992) 11, 12, 13, 14

Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) 4

Pincay v. Andrews, 238 F.3d 1106 (9th Cir. 2000) 1, 5, 10

Richey v. Horner, 244 F.3d 635 (8th Cir. 1992) 11, 12

Rotella v. Wood, 528 U.S. 549 (2000) 6, 7, 8

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 4

Volk v. D.A. Davidson & Co., 816 F.2d 1406 (9th Cir. 1987) 15

Vucinich v. Paine, Webber, Jackson & Curtis, Inc., 803 F.2d 454 (9th Cir. 1986) 10

Wilson v. Garcia, 471 U.S. 261 (1985) 8

Statement of the Case

Petitioners have attempted to build a RICO case on the theory that Respondents had breached certain alleged terms of an oral contract which were disputed, and which were contradicted by the express terms of numerous written documents that Petitioners received over a long course of dealing with Respondents. Assuming *arguendo* that a RICO case could ever be built on such a basis,[1] the sole question here is whether, when the alleged terms of the oral contract are expressly contradicted by repeated written disclosures, those written disclosures suffice to at least create inquiry notice for purposes of the RICO statute of limitations.

The Ninth Circuit, after reviewing the factual record before it, held that the written disclosures did put Petitioners on inquiry notice; indeed, it held that it would be "hard to imagine a clearer case" in which the disclosures created inquiry notice. *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2000).

Petitioners offer nothing remotely adequate to warrant this Court's review of the Ninth Circuit's decision. Petitioners' principal argument here was never even presented below, and therefore, never considered by the circuit court (*see* Point I, below). Petitioners also rely on misstatements of the factual record (*see* Point II, below). In any event, the arguments Petitioners offer, and the purported circuit split they posit, rest on a basic misreading of statute of limitations law (*see* Point III, below). Finally, Petitioners' proposed tolling rule is necessarily wrong as a matter of policy—it would allow long and well-documented courses of dealings to be

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[1] Even the district court noted that Petitioners changed "theories about every four minutes", Appendix A at 1A, resulting in what it described as a "ridiculous type of RICO case." 2A.

thrown into question retroactively simply by the allegation that repeated and express written disclosures were in conflict with the alleged terms of a prior, oral contract. (*See id.*).

In 1967, Petitioner Pincay entered into an oral agreement with Vincent Andrews, Sr., the father of Respondent Vincent Andrews ("Andrews"), to serve as his business manager. Upon the father's death in 1969, Pincay reaffirmed that oral contract with Andrews, acting through Vincent Andrews Management Company ("VAMC"). McCarron orally agreed to retain VAMC in 1979. VAMC handled its clients' financial, accounting, and tax matters, charging its clients (including Petitioners) a flat fee of 5% of their professional income.

In addition to serving as Petitioners' business manager through VAMC, Andrews and, beginning in the mid-1970s, his brother Robert were involved in limited partnerships that they often managed.[2] Respondents offered these investments to Petitioners, other clients, and investors who were not Respondents' clients. Petitioners' entire case—including their RICO claim—is based on the claim that Respondents had undisclosed interests in, and received undisclosed compensation from, the ventures in which Petitioners invested, beyond the 5% fee VAMC received for management services.

In the mid-1980s, Petitioners' deductions from one highly-leveraged tax shelter partnership were disallowed because of wrongdoing by the entity in which the partnership (along with many others) was a passive investor.[3] And the 1986 tax reform legislation reduced

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[2] These ventures were (as Petitioners stipulated) separate from VAMC, though many (such as Andrews & Co. or Higgins-Andrews) carried the Andrews name.

[3] *See, e.g.*, Appendix C, at 1C-2C.

the value of some of Petitioners' other investments. That, among other things, led Pincay to fire VAMC in late 1987; McCarron did the same in early 1988. They filed suit in March and August 1988, respectively.

At trial, Petitioners sought to overcome their statute of limitations problems by claiming that their fiduciary relationship with Respondents excused them from any obligation to investigate any potential claims. In connection with each of the partnerships, however, Petitioners had received written disclosures, many of which were only one or two pages long, that clearly disclosed the interest of Vincent or Robert Andrews or their affiliates, such as Andrews & Co. or Andrews & Co., Inc., often in the first or second paragraphs.[4]

Petitioners testified that they read and understood at least some of these partnership documents; that they were not prevented from reading any of them; and that they signed several forms specifically consenting to the compensation of Andrews, Robert Andrews, or their affiliates for their efforts in finding, evaluating, and managing the partnerships.[5] The Ninth Circuit held, as a matter of law, that the disclosures Petitioners received, read and signed put them on inquiry notice by 1980 at the latest regarding their claims, and thus held Petitioners' RICO claims (the only claims at issue on appeal) were barred by the statute of limitations.

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4 *See* Appendix B, at 1B-4B.

5 *See, e.g.*, 5B-8B.

Argument

I. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS' ARGUMENTS HERE WERE NEITHER PRESENTED TO NOR CONSIDERED BY THE NINTH CIRCUIT

Petitioners here, for the first time, claim that the United States Courts of Appeal for the Seventh and Eighth Circuits have adopted a "no bare access" accrual rule, pursuant to which the RICO statute of limitations commences only when plaintiff has access to "necessary information" *and* is aware of a "suspicious circumstance" that causes plaintiff to review that information. Pet. at 7-12.[6] Petitioners, who never presented this theory during the thirteen years this case has lasted, now claim that the Ninth Circuit erred in not applying that rule. Because this issue forms no part of the judgment from which Petitioners now seek relief, it is not properly presented here and the Petition should be dismissed on this ground alone.

"[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (internal quotations and citation omitted); *see Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (internal quotations omitted). This principle helps "to maintain the integrity of the process of certiorari." *Taylor*, 503 U.S. at 646.

This case does not present any compelling reasons, *see* SUP. CT. R. 10, to depart from that practice. As shown below, there is no conflict between the circuit courts because no circuit has adopted the accrual rule

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[6] Citations to the Petition are noted as "Pet."

that Petitioners posit here as the basis for the alleged conflict. Rather, the issue here is simple: as the Ninth Circuit found, it is "hard to imagine" a clearer case of disclosure for purposes of providing inquiry notice to plaintiffs. *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2000). But even if there were some basis for Petitioners' purported accrual rule, certiorari should not be granted because the Ninth Circuit was not given an opportunity to address Petitioners' arguments.

II. PETITIONERS RELY ON MISSTATEMENTS OF THE RECORD BELOW AND CONTRADICT THEIR OWN TRIAL TESTIMONY

Petitioners also misrepresent material facts, including as follows: Petitioners assert that the 5% business management fee included investments, *see* Pet. at 2, and therefore, that Respondents breached their agreement with Petitioners by receiving additional compensation therefrom. But Petitioners stipulated before the trial court that the alleged terms of their oral contracts were the same, and the same as the alleged terms of Pincay's oral agreement with Vincent Andrews, Sr. in 1967. And it was undisputed that, in 1967, Andrews' father was not involved in any partnership investments. Thus, contrary to Petitioners' contention, the record shows that neither party to the 1967 oral agreement contemplated—much less agreed—that future partnership ventures would fall within the scope of the alleged oral management agreement.

Petitioners' claim that neither Pincay nor McCarron understood the partnership agreements, and that they blindly trusted Respondents to steer them correctly, is also contradicted by Petitioners' own testimony. Pincay, for example, testified that he knew that Andrews was involved in at least some of the part-

nerships,[7] and understood that it was ultimately his decision whether to invest.[8] Pincay admitted that he spoke English regularly and conducted his business in English. And Pincay's wife Linda (who spoke English as her first language) also spoke to Andrews about the partnerships, and prior to her 1985 death signed most of the documents with her husband.[9]

McCarron also admitted knowing that Andrews was involved in at least some partnerships,[10] and that it was his "standard practice" to try to read documents from VAMC.[11] Indeed, McCarron chose to stop investing in oil and gas ventures, and chose not to invest in a horse-stock partnership that Andrews' wife was forming—not because Andrews was involved, but because of the risk involved.[12]

III. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT AND IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

Petitioners fail to address the substance of this Court's decisions in *Rotella v. Wood*, 528 U.S. 549 (2000) and *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). Those decisions addressed the question of when RICO claims accrue and are dispositive of Petitioners' claims here. The Ninth Circuit correctly stated and applied the legal standard announced in those cases. As shown below,

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7 *See* 3A.

8 *See* 4A-5A.

9 *See* 6A-9A.

10 *See* 10A.

11 *See* 11A.

12 *See* 12A.

even assuming Petitioners' new theory could properly be considered here, although not presented below (*see* Point I, above), that theory either:

- takes an unworkably radical position, asserting that even in a case of express disclosures that were as clear as possible for purposes of inquiry notice (as the Ninth Circuit found here), defendant's fiduciary status overrides the possibility of inquiry notice, or
- simply quarrels with the way the Ninth Circuit viewed the express disclosures on the facts of this case.

Neither position has merit, and neither is of a character to warrant this Court's intervention.[13]

A. The Supreme Court Has Already Considered and Rejected Petitioners' Contentions Regarding Accrual

Petitioners simply fail to cite *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 198 (1997), and only note *Rotella v. Wood*, 528 U.S. 549 (2000) in passing, for the proposition that the RICO statute encourages plaintiffs to diligently investigate their claims. *See* Pet. at 16. But those cases, which rejected efforts to extend the four-year RICO statute of limitations, are dispositive of the issues presented here—both because the Ninth Circuit applied the correct rule of law, and because the facts of this case confirm the soundness of those decisions.

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[13] A Petition based on nothing more than an objection to the manner in which an appellate court applied a rule of law under the correct standard of review is inappropriate. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Rotella unanimously rejected the "injury and pattern discovery rule", in part, because such a rule would undermine RICO's "congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices." 528 U.S. at 557-58 (citing *Klehr*, 521 U.S. at 187) (in turn citing *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987)). *Rotella* also noted that the "injury and pattern discovery rule" would permit, for example, a limitations period to begin to run "only eight years after a claim became ripe", which "would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability." 528 U.S. at 559. *See also Klehr*, 521 U.S. at 187 (rejecting "last predicate act rule" because it would allow plaintiff "simply to wait, 'sleeping on their rights', . . . bringing suit only long after the 'memories of witnesses have faded or evidence is lost' ") (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

This action—in which Petitioners claimed to be victims of a RICO scheme based on an alleged oral agreement whose terms dated to 1967—vividly illustrates the wisdom of *Rotella* and *Klehr*. The essence of Petitioners' claim here is that they were excused from any showing of reasonable diligence because the parties were in a fiduciary relationship. That assertion is flatly contrary to this Court's decisions in *Rotella* and *Klehr*, which affirmed that the nature of the remedies available under the RICO statute requires that plaintiffs be diligent in acting on information that comes to their attention.[14] Thus,

[14] This is emphasized by the fact that in both cases, the Court noted that the statute of limitations could be extended through equitable tolling *only* where a plaintiff has demonstrated diligence. *Rotella*, 528 U.S. at 561, ("The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule."); *see also Klehr*, 521 U.S. at 194 ("a plaintiff who is not reasonably diligent may not assert 'fraudulent

Petitioners are actually asking this Court to revisit and limit its recent decisions in this area, without presenting any reason (much less a compelling reason) to do so.

One of the principal reasons for a statute of limitations, and for the parol evidence rule, is to preclude a party who has had the benefit of a bargain for a long time from turning around and crying fraud based on unverifiable allegations of long-ago conversations and alleged oral agreements that contradict later, written agreements. To find that clear, written, *signed* securities disclosures can be ignored by a plaintiff who then sues for RICO fraud would contravene these rules, violate public policy encouraging reliance on written disclosures, and greatly complicate routine business transactions—forcing professionals to take self-protective efforts that accord clients little additional protection from actual fraud or malfeasance while imposing greater costs on all involved.

B. The Petition is Improper and Should be Denied Because the Asserted Error Concerns the Manner in Which the Ninth Circuit Applied the Correct Rule of Law

In fact, Petitioners' proposed "no bare access" accrual rule amounts to no more than an objection to the way that the Ninth Circuit applied settled law to facts that were admitted or undisputed. Petitioners insist that, in assessing when inquiry notice occurs, courts should not assume that a plaintiff has knowledge of every document to which he or she has access (no matter how numerous), but rather should look to many factors, including plaintiff's access to the information, defendant's conduct in

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concealment.' "). In contravention of *Rotella* and without citing a single case that would support the result, the rule that Petitioners advocate here would make tolling the default, not the exception, in cases where the parties are in a fiduciary relationship.

concealing the alleged wrongdoing, plaintiff's opportunity to detect the fraud, and the relationship between the parties. Yet, as Petitioners' own authorities show, the Ninth Circuit already follows a multi-factored approach in determining inquiry notice, *see Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454, 459-61 (9th Cir. 1986) (listing factors court considers); *Luksch v. Latham*, 675 F. Supp. 1198, 1203 (N.D. Cal. 1987) ("any authority there may be to support adoption of the per se imputation rule urged by [defendant] is contrary to a wealth of Ninth Circuit law."), and did so here.

Specifically, the court below evaluated, *inter alia*, the relationship between the parties, *see Pincay*, 238 F.3d at 1109, the information contained in the disclosures that Respondents gave to Petitioners, *id.* at 1107-08, 1110, Petitioners' ability to access the information, *id.*, and the alleged oral agreement between the parties, *id.* at 1107. Far from assuming Petitioners' knowledge, the court below evaluated all of those relevant facts and determined as a matter of law that "no reasonable jury could find that Pincay and McCarron did not have constructive notice of their injuries before 1985". *Id.* at 1109. Thus, since the Petition reduces to an objection to the result that the Ninth Circuit reached, the Petition should be denied because the lower court applied the correct rule of law.

C. No Court Has Ever Adopted a "No Bare Access" Accrual Rule as Petitioners Describe it and, in Fact, Petitioners' Authorities Undermine Their Contentions Here

Nor is there merit to Petitioners' contention that the Seventh and Eighth Circuits follow a "no bare access" accrual rule that somehow conflicts with the decision below. Rather, the Seventh and Eighth Circuit cases cited in the Petition stand for the unsurprising rule that

plaintiff's ease of access to the information revealing defendant's wrongful conduct is a factor to be considered in assessing whether plaintiff had inquiry notice. *See Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997),[15] *Great Rivers Co-Op of S.E. Iowa v. Farmland Indus.*, 120 F.3d 893 (8th Cir. 1997), *McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992), *Davidson v. Wilson*, 973 F.2d 1391 (8th Cir. 1992), *Richey v. Horner*, 244 F.3d 635 (8th Cir. 1992).

For example, while *Fujisawa* rejected the notion that plaintiff's access to "everything in a company's files" is sufficient to start the statute of limitation running at the time of acquisition, it also noted that

> the facts that put the victim of the fraud on notice can fall short of actual proof of fraud. How short may depend on the victim's access to the information that he will need in order to be able to plead a reasonably well substantiated and adequately particularized case of securities fraud, bearing in mind that before he files his suit he will not have the aid of compulsory process. The better his access, the less time he needs.

Id.

Here, Respondents' written disclosures gave Petitioners *all* of the information they required to be on notice of their claims. According to Petitioners' theory at trial, the 5% fee in their alleged oral contracts with VAMC precluded Andrews, his brother Robert Andrews, VAMC, or any other entity they controlled from receiving any compensation from any partnership in which Petitioners invested, and Respondents purportedly schemed—from 1969 through the late 1980s—to hide

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[15] Research has revealed no case other than *Fujisawa* that refers to "bare access" in a manner that is relevant to the accrual issue.

their compensation from Petitioners. Given that alleged scheme, Petitioners needed to expend little, if any, effort besides reading any of the dozens of documents they received to be on notice of their claims.

Petitioners claim, however, that the disclosures were defective because they did not state "explicitly or prominently, that Pincay and McCarron understood that the compensation referred to in the documents was in addition to 5% of their yearly income." Pet. at 13. How the disclosures could have been clarified is unclear and, in any event, such clarification would not have helped Petitioners' cause here. *See, e.g., Great Rivers Co-op.*, 120 F.3d at 897 ("[T]his requirement of some awareness does not mean that an injured party will necessarily avoid the statute of limitations by turning a blind eye to what is obviously in full view"); *McCool,* 972 F.2d at 1462 ("If a communication would have been no different if issued by an honest defendant, it cannot be an act of concealment."). Petitioners cite no authority for the proposition that, in addition to disclosing the relevant information, a disclosure must expressly provide that plaintiff understood the information conveyed.

At bottom, Petitioners' proposed new rule of law would relieve them of their obligation to show that they were reasonably diligent—contrary to the settled law of every circuit. *See, e.g., Fujisawa*, 115 F.3d at 1334 (plaintiff "should have learned [of the alleged fraud] through the exercise of ordinary diligence"); *Richey*, 244 F.3d at 638-39 (limitations period "may be triggered even though the victim is unaware of the misleading statements if, in exercising reasonable diligence, he should have discovered their misleading nature.") (citing *Great Rivers*, 120 F.3d at 896). Even the "suspicious circumstance" that Petitioners claim must be present in order to put a plaintiff on notice presumes that the plaintiff was diligent. *See Fujisawa*, 115 F.3d at 1335

("*How* suspicious the circumstances need be . . . will depend on how easy it is to obtain the necessary proof by a *diligent* investigation aimed at confirming or dispelling the suspicion.") (first italics in original, second italics added); *Davidson*, 973 F.2d 1391 ("[A] plaintiff may not ignore 'storm warnings' which would alert a *reasonable* investor to the possibility of fraud.") (internal quotations omitted, emphasis added). Petitioners cannot point to any place in the record that shows they exercised any diligence at all.

Instead, Petitioners claim that they had no duty to investigate because the parties were in a fiduciary relationship and Petitioners are relatively unsophisticated investors. Pet. at 17. The Ninth Circuit properly rejected Petitioners' assertion that they had no duty to investigate simply because Respondents were Petitioners' fiduciaries.[16] Indeed, Petitioners' own authorities fail to support their contentions here. *See*, *e.g.*, *McCool*, 972 F.2d at 1463 ("[I]t is apparent that the investors were relying on personal trust to protect their investments, not on legal documents. But neither easy mistakes nor trust toll the statute of limitations. Only diligence suffices."); *Hilton v. Munaw*, 522 F.2d 588 (9th Cir. 1975) (fiduciary relationship does not relieve one of all duties to inquire about potential fraud).

Nor can Petitioners claim that their lack of sophistication prevented them from being on inquiry notice. In *Great Rivers*, 120 F.3d at 897-98, the court rejected plaintiff's contention that he had no duty to investigate because he was an unsophisticated investor, holding that

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[16] Contrary to Petitioners' assertion, the Ninth Circuit considered and rejected their argument that constructive notice does not start the statute of limitations in a fiduciary case. *Compare* Pet. 16-17 (claiming that the Ninth Circuit's decision did not consider the fiduciary relationship) *with* Pet. A6-7 (rejecting Petitioners' argument concerning the fiduciary relationship between the parties).

the general and self-serving information plaintiff received in a single newsletter was sufficiently suspicious to trigger a duty to investigate. The case here is clearer: as the court below found, it is "hard to imagine" clearer disclosure for purposes of inquiry notice than was provided here, including signed, one-paragraph consent forms, and one and two-page documents that clearly disclosed Respondents' interest in the first or second paragraphs.

Petitioners received disclosures for each of the partnerships in which they invested (29 for Pincay, 13 for McCarron). Some of these disclosures revealed that Respondents would receive compensation in an amount greater than, or at least different from, 5%. Thus, even if Petitioners assumed that Respondents' compensation from the partnerships was included in the 5% flat fee, documents revealing rates other than 5% unquestionably triggered their duty to investigate. *See McCool*, 972 F.2d at 1463 ("While reasonable investors need not necessarily understand legal jargon, they must understand that contracts have *some* significance. Something is clearly amiss when the same piece of paper purports to mean different things on different occasions.") (emphasis in original). Under these facts, Petitioners' proposed rule would make tolling automatic and virtually irrefutable, regardless of the nature of the disclosures.

Finally, Petitioners' claim that there must be "undisputed evidence" in order for a court to find notice as a matter of law is simply wrong. Only one of Petitioners' cases even mentions "uncontroverted evidence", and does so in a way that suggests that Petitioners' "question presented"[17] should be answered in the negative. *See*

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[17] "Whether, in a suit against fiduciaries alleging mail and wire fraud . . . the jury's rejection of the fiduciary's assertion of the statute of limitation mandates a finding for Petitioners regarding that defense."

Great Rivers, 120 F.3d at 896 ("When uncontroverted evidence irrefutably demonstrates that a plaintiff had inquiry notice of fraudulent conduct, the issue of notice is amenable to summary judgment.") (citation omitted); *see also id.* at 897 ("[T]here might be circumstances where the evidence of awareness is so overwhelming that there is no genuine dispute on the issue for purposes of summary judgment.") (citations omitted); *Davidson*, 973 F.2d at 1402 ("Whether a plaintiff is on notice of the possibility of fraud is an objective question amenable to summary judgment. The court must determine whether the plaintiff possessed such knowledge as would alert a reasonable investor to the possibility of fraud.") (quoting *Hirschler v. GMD Investments Ltd. Partnership*, Fed. Sec.L.Rep. ¶95,919 at 99,563 (E.D.Va. 1991) (in turn quoting *Davis v. Birr, Wilson & Co.*, 839 F.2d 1369, 1370 (9th Cir. 1988))).[18]

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[18] Petitioners' remaining authorities also do not support their "no bare access" accrual rule, or a finding that the Ninth Circuit's decision below is in conflict with other federal courts. *See Cooperativa De Ahorro y Credito Aguada v. Kiddder, Peabody & Co.*, 129 F.3d 222 (1st Cir. 1997) (plaintiff's claims time barred because diligent inquiry would have revealed defendant's wrongdoing); *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 351 (2d Cir. 1993) (plaintiff, regardless of length of the documents, had a duty to inquire when information was "clearly disclosed in a manner sufficient to put reasonable investor on constructive notice"); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406 (9th Cir. 1987) (statute of limitations accrues when plaintiff should have discovered facts constituting his claim, regardless of relationship between the parties); *Beneficial Standard Life Ins. Co. v. Madriaga*, 851 F.2d 271 (9th Cir. 1988) (remanding to district court to determine whether plaintiff engaged in diligent investigation); *Armstrong v. McAlpin*, 699 F.2d 79, 88 (2d Cir. 1983) ("[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.") (internal quotations omitted).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a writ of certiorari.

Respectfully submitted,

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August 1, 2001

APPENDIX A

[14] MR. BOIES: Well, because this issue was briefed. The Court did not just sua sponte issue this order in June of 1996. This matter was briefed two and three times by both sides.

THE COURT: Well, I know but—

MR. BOIES: Your Honor, if I could—

THE COURT: —you missed a lot of the fun of this case.

MR. BOIES: Yes.

THE COURT: This thing, as I told you before, was like a moving and swinging target, depending upon which lawyer got to the podium at a given time. Mr. (pause)—

MR. BOIES: Papiano?

THE COURT: Mr. Papiano changed theories about every four minutes, and I don't mean this critical of Mr. Papiano. I'm not sure that he knew what theory he was really addressing. He just knew that there were some bad guys over there that hurt these good guys and the bad guys should pay for the good guys, and the jury might have understood that theory also.

But, in one sense, I'd sort of like to see what the final arguments were, but I'm not going to put us all through buying some transcript, though I guess one side or the other is going to have to buy some transcript eventually here anyway, and it will be an expensive transcript, but I'd * * *

[114] THE COURT: Or inadmissible.

MR. ESENSTEN: I agree.

MR. MCADAM: Your Honor, we have not talked about RICO.

THE COURT: No, I know we haven't.

MR. MCADAM: I've got a feeling.

THE COURT: Tell me what you think the RICO claim is.

MR. MCADAM: They committed acts of mail and wire fraud.

THE COURT: Which acts are they of the mail and wire fraud?

MR. MCADAM: They used t he mails, telephones to make these—

THE COURT: To get the five percent?

MR. MCADAM: —representations, concealments—

THE COURT: Excess of five percent?

MR. MCADAM: Correct. It was all part of the scheme and, essentially, that's what the game was all about. So you have an enterprise.

THE COURT: Other than attempts of RICO in copyright cases that we have had recently, I'd have to say this is really sort of a ridiculous type of RICO case, but I have previously ruled on a motion for summary judgment that there is enough to go to the jury, and I don't think this * * *

[108] Q. Is that yes?

A. Yes.

Q. Okay. When you saw the words "Andrews & Company", you thought of either Vincent or his brother Robert; is that right?

A. Vincent.

Q. So you weren't even confused by "Andrews & Company". You knew that once you saw the word "Andrews", that signified to you Vincent.

A. Yes.

Q. Now, let's go to page 2. Okay. Again, we are on paragraph 5G. Again, you didn't see that paragraph even going through it; is that right?

A. No, I didn't. Yes.

Q. Now, let's go to the last page. I'm not sure. Is it stipulated he signed it?

MR. PAPIANO: Well, I'd like to have the jury see the last page.

THE COURT: There is no stipulation.

MR. ESENSTEN: Okay.

Q. Let's turn to the last page.

MR. PAPIANO: Your Honor, part of the last page is taken off here in the left-hand corner. I'd like to have the jury see the entire last page.

MR. ESENSTEN: It says. "Sign here".

* * *

[101] BY MR. ESENSTEN:

Q. Did you make the decision to whether to go in this or not?

A. No. He made the decision.

Q. Well, maybe I asked a bad question, Mr. Pincay. Let me ask it this way:

Nobody forced you to go into these, did they?

A. No.

Q. And you had the right to say no if you wanted to, correct?

A. Yes.

Q. And you understood that you could have said no to any one of these partnerships?

A. Yes.

Q. And you also understood that you were a business management client of Vincent Andrews Management at the time you went into this partnership, right?

A. Yes.

Q. Was it your understanding that you could have stopped being a business management client of Vincent Andrews Management Corporation at any time?

A. Yes.

Q. But you continued to remain a business management client?

A. Yes.

[102] Q. Now, when this document was sent to you, exhibit 723—

MR. PAPIANO: Can we see the signature page on that?

MR. ESENSTEN: We stipulated he signed it.

THE COURT: All right. Let's go. Question.

BY MR. ESENSTEN:

Q. When you got this document, exhibit 723, did you understand that you could have decided not to sign it and not go into it?

A. Yes.

Q. But it was your decision to go ahead.

A. Yes.

THE COURT: Let me just again try to clarify. With reference to all of the partnership documents that you signed, did anyone force you to sign it?

THE WITNESS: No.

THE COURT: Did you realize as to all of the partnership documents that you signed that you didn't have to sign it if you didn't want to?

THE WITNESS: Yes.

THE COURT: And as to all the partnership documents that you signed, did you sign them voluntarily knowing that you were entering that partnership?

THE WITNESS: Yes.

THE COURT: All right. Go ahead.

* * *

[108] A. Well, I think he was comfortable. I mean there's no—

MR. PAPIANO: Objection, your Honor. Move to strike. Speculation.

THE COURT: Yes, what was said rather than what you thought.

THE WITNESS: Oh. Well, that he said he liked Ted Clifford and that he trusted him and, you know, I presented all the facts to Laffit and basically said, "You know, it's up to you. I'm going to show this to some other people, but it's up to you, whatever you want to do and it's your decision".

BY MR. ESENSTEN:

Q. While we are on the comfort level issue, you told us that you'd had conversations with Laffit and Linda Pincay over the years; is that right?

A. That's correct.

Q. When you would present some investments in person to Mr. Pincay, would you generally have the conversation with both Laffit and Linda Pincay?

A. Yes.

MR. PAPIANO: Objection, your Honor. Improper foundation.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. ESENSTEN:

[109] Q. Would you discuss the contents of the conversation with both of them?

A. Yes.

Q. Would you have conversations with both of them?

A. Yes.

Q. And we have seen a number of documents Linda also signed.

A. That's correct.

Q. Did she give her consent to you that she wanted to also go into the investment with her husband?

MR. PAPIANO: Objection, your Honor. Calls for speculation.

THE COURT: Overruled.

THE WITNESS: Yes.

* * *

[69] and felt that we could acquire these properties, this particular property, at a very reasonable price. We were able to get a mortgage, a good reasonable loan and we thought that this could become a good income-producing property to be held for a long-term appreciation.

I remember the Pincays saying that they were comfortable with the relationship with myself and Graham because our other investment had been working nicely and that they would be comfortable in investing in a particular property like this. In fact, I remember at this particular discussion that I think it was Linda said that she liked the idea that I was general partner because she felt I was in there helping to protect their particular investment, and if I made money, that was fine.

Q. Now, you just mentioned something about Linda Pincay. Did you have separate conversations with Linda Pincay that Laffit Pincay was not party to?

A. Many times.

MR. PAPIANO: Objection. Hearsay, your Honor.

THE COURT: Overruled.

THE WITNESS: Many.

BY MR. ESENSTEN:

Q. And over the years, did you have these conversations pertaining to these partnerships also?

A. Yes.

[70] Q. And did it pertain to the every-day business management things with Mr. and Mrs. Pincay?

A. Yes.

MR. PAPIANO: Objection, your Honor. Nor relevant to this action with respect to whether there is any agency or whatever is being claimed with respect to the deceased Linda Pincay.

THE COURT: Overruled.

BY MR. ESENSTEN:

Q. At times, would you speak to Linda Pincay more than you would Laffit Pincay?

A. I definitely spoke to her more than I spoke to Laffit.

Q. Why is that?

A. Linda would speak to our office almost every day. I might speak to her at times, certainly once a month, sometimes some months once a week, just it depended where I was, where they were. She was very involved in their business affairs and I spent an awful lot of time talking to her about all various matters, whether they were business management matters or their real estate matters, investment matters, whatever.

Q. And you understood she was a limited partner, didn't you?

A. That's correct.

Q. Now, I'm going to show you the front page of exhibit * * *

[29] Q. So you had no idea that Mr. Andrews was involved with Higgins-Andrews 1985, 1984, 1983, 1982 and 1981 before you terminated Mr. Andrews.

A. The only involvement I thought he had that he invested some money of his own.

Q. You didn't know he was a general partner.

A. No, I did not.

Q. You never saw anything that was handed to you that would show that he was a general partner.

A. That's correct.

Q. Now, please, sir, turn to exhibit 253. This is a letter to you dated September 18, 1985; is that right?

MR. PAPIANO: Excuse me. What exhibit number?

MR. ESENSTEN: 253.

Q. Is this a letter to you dated September 18, 1985?

A. Not, it is not.

MR. PAPIANO: Not on mine either.

MR. ESENSTEN: May I approach, your Honor?

MR. PAPIANO: May I also, your Honor, to see the document?

* * *

[38] and answer form booklet and that's where the deposition is from.

All right. You may read it.

MR. ESENSTEN: "QUESTION: Do you recall receiving any documents from Vincent Andrews Management Corporation at all?

ANSWER: Sure. I remember receiving documents from Vincent Andrews Management Corporation.

QUESTION: And did you review those documents when you received them?

ANSWER: There were times when I did, yes.

QUESTION: Did you have a standard practice as to whether you would review them when you received them from Vincent Andrews Management Corporation?

ANSWER: Yes, I did.

QUESTION: And what was that practice?

ANSWER: To read them and try and understand them the best I could."

Q. Now, let's look at a few partnership agreements. First, look at Monetary Associates, exhibit 698, and on the board it's the first page of exhibit 698, Partnership Agreement of Monetary Associates.

Now, sir, Monetary Associates, the agreement is dated October 12, 1979. This was some months, just a few months after you hired Vincent Andrews Management; is that * * *

[21] Q. Did there come a time when something was offered to you that you did refuse to invest in?

A. Yes.

Q. What were those circumstances?

A. Well, I told him I didn't want to be putting any more money into the oil, first of all; and the second one that I turned down was investing in stallion shares, blood stock, race horses.

Q. Would you explain to the jury what you mean by investing in stallion shares?

A. Well, Vinnie called me one day and said that—said that his wife, who was a blood stock agent, was putting together some partnership to invest in some of the better stallions that were standing in Kentucky, and—

THE COURT: What do you mean by "standing".

THE WITNESS: Okay. The studs, the stallions that are used for breeding purposes are kept at various farms in Kentucky, in Lexington, Kentucky, and throughout that whole region, and when we use the term "stand" that means that's where the horse resides and that's where the people take care of them, and some of the farms have 30, 40, 50 stallions at each place, and during the spring, they use

* * *

APPENDIX B

1B

PARTNERSHIP AGREEMENT
of
ADDISON ASSOCIATES

AGREEMENT made as of August 12, 1980, among the persons listed on Schedule "A" attached hereto, including Andrews & Company, Inc., the Managing Partner. The Managing Partner is a Connecticut corporation controlled by Robert Andrews.

1. NAME. The partnership [hereinafter the "Partnership"] shall be conducted under the name of ADDISON ASSOCIATES and shall be a partnership under the laws of the State of New York.

2. CHARACTER. The purpose of the Partnership is to make investments in various ventures which, in the opinion of the Managing Partner, will provide the possibility of capital appreciation, income and tax benefits to the partners, each of whom is in a high income tax bracket. The Partnership shall initially invest in The Securities Group 1980, a New York limited partnership, which was organized for the purpose of acting as broker-dealer and market maker in Securities, financial futures and foreign exchange, all as described in the Private Offering Circular for The Securities Group 1980, a copy of which, together with its accompanying documents, each partner acknowledges having received and read. As provided in Section 1.06 of the Limited Partnership Agreement for The Securities Group 1980, each limited partner shall be liable for recourse obligations in an amount equal to three times the original capital contribution. Accordingly, the partners (other than the Managing Partner, which shall make no capital contribution) shall, upon execution of this agreement, each contribute capital to the Partnership in the amounts set forth in Schedule "A" attached hereto, and such additional amounts upon which

they may from time to time mutually agree. Each partner (other than the Managing Partner) agrees to be personally liable to the Partnership for an amount three (3) times the contribution set forth opposite his name in Schedule "A" for recourse obligations of the Partnership to The Securities Group 1980. Each such partner agrees to contribute such additional amount to the Partnership as required in connection with the Partnership's obligations to The Securities Group 1980 immediately upon demand by the Managing Partner. Each partner (other than the Managing Partner) also agrees to contribute such additional funds as may be required, in the opinion of the Managing Partner, for necessary operating expenses of the Partnership if available funds are insufficient for such purposes.

3. TERM. The Partnership shall begin August 12, 1980 and shall terminate upon the first of the following to occur:

* * *

PARTNERSHIP AGREEMENT
of
FAIRVIEW ASSOCIATES

AGREEMENT made as of April 23, 1984, among the persons listed on Schedule "A" attached hereto, including Andrews & Company, Inc., the Managing Partner. The Managing Partner is a Connecticut corporation controlled by Robert Andrews.

1. NAME. The partnership [hereinafter the "Partnership"] shall be conducted under the name of FAIRVIEW ASSOCIATES and shall be a partnership under the laws of the State of Connecticut.

2. CHARACTER. The purpose of the Partnership is to make investments in various ventures which, in the opinion of the Managing Partner, will provide the possibility of capital appreciation, income and tax benefits to the partners, each of whom is in a high income tax bracket. The Partnership shall initially invest in OLENTANGY COMMONS LIMITED PARTNERSHIP (an Ohio Limited Partnership) ["Olentangy"], and in FRANKLIN PARK INVESTORS LIMITED PARTNERSHIP (a Michigan Limited Partnership) (the "Limited Partnerships") ("Franklin Park"). The investments are described in the Confidential Investment Summary prepared with respect to each limited partnership, a copy of which, together with the accompanying documents, each partner acknowledges having received and read. As provided in the limited partnership agreements for the Limited Partnerships, the investments of the limited partners thereof are to be made in installments of approximately 24% on initial subscription, approximately 24% on February 1, 1985 and in reduced installments on February 1, 1986, 1987 and 1988. The Partnership intends to invest in Olentangy and Franklin Park respectively, in an approximate rela-

tionship of 45 to 55. Accordingly, the partners (other than the Managing Partner, which shall make no capital contribution), shall, upon execution of this agreement, each contribute capital to the Partnership the amounts set forth in Schedule A and such additional amounts as the Managing Partner shall determine. Each partner (other than the Managing Partner) shall be personally liable to the Partnership for up to 3.1 times the initial contribution set forth opposite his name in Schedule "A" for recourse obligations of the Partnership to the Limited Partnerships. Each such partner agrees to contribute such required additional amount to the * * *

Taber Mill Company
c/o Related Housing Companies
Incorporated, General Partner
645 Fifth Avenue
New York, New York 10022

Re: Taber Mill Company

Gentlemen:

Robert Andrews, Esq. acted as my "Offeree Representative" (as that term is used in Rule 146 under the Securities Act of 1933) in connection with my purchase of a limited partnership interest in Taber Mill Company (the "Partnership"). The Offeree Representative has informed me that, except as set forth below, there are no material relationships between the Partnership or its affiliates and the Offeree Representative or his affiliates, which now exist or which are contemplated or which have existed at any time during the previous two years. The Offeree Representative has also informed me that, except as set forth below, no compensation has been received, or is to be received, as a result of such relationship.

Sincerely.

Residence Address:

5200 Los Grandes Way

Los Angeles, CA 90027

Dated: 5/30/80

/s/ LAFFIT PINCAY JR.
LINDA PINCAY
(Signature)

LAFFIT PINCAY JR.
& LINDA PINCAY
(Please Print Name)

Robert Andrews, (and persons and companies affiliated with Robert Andrews, collectively "Andrews") have assisted the Partnership in the placement of limited partnership interests. Andrews will receive compensation from the Partnership with respect to their participation in the placement of such interests, such compensation to be in the amount of five percent (5%) of the capital contributions to be paid by such investors.

In the past Andrews has assisted in the placement of partnership interests in other similar partnerships for which Andrews received similar compensation. It is anticipated that in the future Andrews will act in a similar capacity with respect to other partnerships similar to the Partnership.

Taber Mill Company
c/o Related Housing Companies
Incorporated, General Partner
645 Fifth Avenue
New York, New York 10022

Re: Taber Mill Company

Gentlemen:

Robert Andrews, Esq. acted as my "Offeree Representative" (as that term is used in Rule 146 under the Securities Act of 1933) in connection with my purchase of a limited partnership interest in Taber Mill Company (the "Partnership"). The Offeree Representative has informed me that, except as set forth below, there are no material relationships between the Partnership or its affiliates and the Offeree Representative or his affiliates, which now exist or which are contemplated or which have existed at any time during the previous two years. The Offeree Representative has also informed me that, except as set forth below, no compensation has been received, or is to be received, as a result of such relationship.

Sincerely.

Residence Address:

1078 Linda Glenn Drive

Pasadena, CA 91105

Dated: 5/30/80

/s/ CHRISTOPHER J. MCCARRON
(Signature)

CHRISTOPHER J. MCCARRON
(Please Print Name)

Robert Andrews, (and persons and companies affiliated with Robert Andrews, collectively "Andrews") have assisted the Partnership in the placement of limited partnership interests, Andrews will receive compensation from the Partnership with respect to their participation in the placement of such interests, such compensation to be in the amount of five percent (5%) of the capital contributions to be paid by such investors.

In the past Andrews has assisted in the placement of partnership interests in other similar partnerships for which Andrews received similar compensation. It is anticipated that in the future Andrews will act in a similar capacity with respect to other partnerships similar to the Partnership.

to plaintiff, and to fully and truthfully disclose to plaintiff all material aspects concerning any proposed limited partnership investment.

80. Plaintiff's reliance upon defendants' representations were reasonable in that plaintiff lacked sophistication in financial matters, believed that defendants were experts in these matters, had employed defendants and paid them to provide expert financial advice, and had the trust and confidence in defendants concerning financial matters.

81. As a direct result of defendants' material misstatements and omissions plaintiff has been damaged in the amount of at least $500,000.

ELEVENTH CAUSE OF ACTION

(Implied Indemnity)

(Against All Defendants

82. Plaintiff realleges and reincorporates herein by reference the allegations contained in paragraphs 1 through 17, and 29 through 33, inclusive, as though realleged here in full.

83. Defendants failed to perform in accordance with fiduciary duties owed plaintiff and failed to perform in accordance with the parties' agreement, which agreement is alleged above. Among other things, defendants failed to place plaintiff's interest above their own, failed to invest plaintiff's money in marketable investments that would provide plaintiff with a financially secure future and invested plaintiff's money in unsuitable tax shelters in which defendants were financially interested.

84. As a direct result of defendants' failure to perform as alleged in the preceding paragraph, plaintiff has been,

the target of lawsuits and Internal Revenue Service assessments arising from his investments. Said "investments," including Addison Associates and Monetary Associates were mere tax shelters not designed to produce profit and were attacked by the United States Revenue Service and the Franchise Tax Board as such. As a result of the Internal Revenue Service and Franchise Tax Board's attacks, and as a result of the improper deductions, interest and penalties which he was charged, plaintiff was compelled to and did pay in excess of $150,000.00, to taxing authorities. The precise amount of defendant's loss is unknown, at this time, because pertinent documentation remains in defendant's control.

85. Furthermore, as a direct result of defendants' placing plaintiff's money in the Addison and Monetary Associates limited partnerships, plaintiff has been the target of a civil lawsuit by creditors of the general partners of these limited partnerships. Defendants, as general partners of Addison and Monetary Associates, structured the partnerships so that the "limited" partners assumed risk of loss for partnership debts at three times their investment. Addison and Monetary Associates are named defendants in the *Securities Group Litigation*. As a result of the limited partnership investments, plaintiff faces potential liabilities of three times his investment.

86. Defendants are aware of the *Securities Group Litigation*, and plaintiff's potential liabilities flowing from that litigation. Furthermore, defendants are aware of the * * *

(3)

Supreme Court, U.S.
FILED
AUG 13 2001
CLERK

No. 01-0009

In the Supreme Court

OF THE

United States

LAFFIT PINCAY, JR. AND CHRISTOPHER J. MCCARRON,
Petitioners,

VS.

VINCENT S. ANDREWS, ROBERT ANDREWS, AND
VINCENT ANDREWS MANAGEMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. PETITION'S QUESTION RAISED IN COURT OF APPEALS	1
II. PREVIOUS OPINIONS OF THE SUPREME COURT HAVE NOT CONSIDERED PETITIONERS' CONTENTIONS	4
III. THE RECORD SUPPORTS THE PETITION	6
CONCLUSION	7

Appendix A attached, B, C and D lodged with Court under separate cover.

TABLE OF AUTHORITIES

Page

Cases

Davidson vs. Wilson, 973 F.2d 1391 (8th Cir. 1992) 3

Fujisawa Pharmaceutical Co. Ltd. vs Kapoor, 115 F.3d 1332 (7th Cir. 1997) 3, 6

Gilbrook vs. City of Westminster, 177 F.3d 839 (9th Cir. 1999) cert. denied 528 U.S. 1061 (1999) 3

Great Rivers Co-Op of S.E. Iowa vs. Farmland Indus., 120 F.3d 893 (8th Cir. 1997) 3, 6

Hilton vs. Mumaw, 522 F.2d 588 (9th Cir. 1975) 2

Klehr vs. A.O. Smith Corp., 521 U.S. 179 (1997) 4, 5

Luksch vs. Latham, 675 F.Supp. 1198 (N.D. Cal. 1987) 2

Maiz v. Virani, 253 F.3d 641 (11th Cir. 2001) 3

McCool vs. Strata Oil, 972 F.2d 1452 (7th Cir. 1992) 3

Reeves vs. Sanderson Plumbing Prod., 530 U.S. 133 (2000) 3

Ritchey vs. Horner, 244 F.3d 635 (8th Cir. 2001) ... 3

Rotella vs. Wood, 528 U.S. 549 (2000) 4, 5

Vucinich vs. Paine, Webber, Jackson & Curtis, Inc., 739 F.2d 1434 (9th Cir. 1984) 2

Vucinich vs. Paine, Webber, Jackson & Curtis, Inc. 803 F.2d 454 (9th Cir. 1986) 2

TABLE OF AUTHORITIES

Page

Treatises

17A Am Jur 2nd CONTRACTS § 224 (2000) ... 3

17A Am Jur 2nd CONTRACTS § 237 (2000) ... 3

37 Am Jur 2d FRAUD AND DECEIT § 254 (2000) 3

ARGUMENT

I.

PETITION'S QUESTION RAISED IN COURT OF APPEALS

Petitioners' petition for rehearing and rehearing en banc, argued, for example, that "the panel apparently believes the issue of constructive knowledge is simple: the panel need only (1) note that Pincay and McCarron received a document before 1985, and (2) determine that the document contradicted the appellants' oral agreement to manage Pincay's and McCarron's financial affairs for a flat fee of 5% of Pincay's and McCarron's respective annual incomes."[1] In other words, the panel fashioned a "per se rule of imputation upon receipt."[2] Petitioners asked the court to reconsider its "per se rule of imputation upon receipt" because the rule caused the court to make a decision that conflicts with decisions of other courts in the Ninth Circuit.[3] Further, petitioners' answering brief argued that since the parties disputed the underlying facts, the issue of inquiry notice was not a question of law, and that substantial evidence supported the jury's conclusion that petitioners were not on inquiry notice before 1985. In sum, petitioners gave the court of appeals an opportunity to address petitioners' arguments and the question of whether the jury's rejection of the fiduciaries' assertion of the statute of limitations mandates a finding for petitioners regarding that defense.

True, the Seventh Circuit and Eighth Circuit cases cited in the petition were not presented to the court of appeals. But that does not diminish the importance of the conflict resulting from the court's decision, or cause this case to be

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[1] Appendix B p. 4.

[2] Appendix B pp. 3, 7 n. 20.

[3] See, e.g., Appendix B p. 1.

unworthy of Supreme Court review. Indeed, the Seventh Circuit and Eighth Circuit cases support the decisions of the other courts of the Ninth Circuit that conflict with the court of appeals' decision. Moreover, as the Seventh Circuit and Eighth Circuit cases confirm, the conflict pointed out in the petitions for rehearing is direct, real, has a broad impact, and will have continuing future consequences.

Respondents recognize that apart from the actual litigants here, the Court's resolution of the conflict created by the court of appeals' decision will affect persons who are in fiduciary relationships, or future RICO litigation arising out of such relationships.[4] On one side, the court of appeals' "per se rule of imputation upon receipt" or "bare access accrual" rule negates the reality that a fiduciary relationship often lulls the beneficiary into a sense of trust or security, and, thus, the fiduciary's documents received and signed by the beneficiary may not excite the beneficiary's suspicion.[5] On the other side, paraphrasing respondents, a statute of limitations exists, obviously, to prevent beneficiaries from asserting rights against fiduciaries after the lapse of time. Accordingly, when fiduciaries try to forecast their contingent liabilities in those cases, they will depend on whether federal law conclusively presumes knowledge of the contents of

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[4]BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI (hereafter "BRIEF") p. 9 ("One of the principal reasons for a statute of limitations, and for the parol evidence rule, is to preclude a party who has had the benefit of the bargain for a long time from turning around and crying fraud...."); Brief p. 1-2 ("no bare access accrual" rule would allow long and well-documented courses of dealings to be thrown into question retroactively); and Brief p. 13.

[5]Cf., e.g, *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454, 459-61 (9th Cir. 1986), and earlier at 739 F.2d 1434, 1436-37 (9th Cir. 1984); *Hilton v. Mumaw*, 522 F.2d 588, 595-97 (9th Cir. 1975); *Luksch v. Latham*, 675 F.Supp. 1198, 1202-03 (N.D.Cal. 1987). Note: These cases were cited, among other cases, in the petition for rehearing. See e.g., Appendix B p.5.

documents provided by the fiduciaries, or whether federal law considers other evidence. Moreover, by fashioning, in effect, a conclusive presumption, the court of appeals avoided the well-settled obligations to (1) draw all reasonable inferences in favor of petitioners, (2) not to make credibility determinations, and (3) not to weigh the evidence differently from the jury.[6]

To be sure, well-settled common law presumes that a person who signs a contract knows it contents. Yet, that principle does not apply when, as proven here, the other contracting party engaged in fraud, misrepresentation, or other wrongful acts.[7] Moreover, it is well settled that a beneficiary in a confidential relationship is justified in assuming that his or her fiduciary will not act inconsistent with the beneficiary's welfare and may justifiably rely on the fiduciaries' representations.[8]

The Seventh Circuit and Eighth Circuit both require undisputed evidence that (1) a suspicious circumstance occurred, (2) the suspicious circumstance was sufficient to prompt accessing the information, and (3) the plaintiff was aware of that suspicious circumstance.[9] Both circuits would

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[6]See, e.g., *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 149-151 (2000); *Gilbrook v. City of Westminster*, 177 F.3d 839, 856-57 (9th Cir. 1999), cert. denied 528 U.S. 1061 (1999).

[7]See, generally, Am Jur 2d CONTRACTS § 224 (2000).

[8]See, generally, 17A Am Jur 2d CONTRACTS § 237 (2000); 37 Am Jur 2d FRAUD AND DECEIT § 254 (2000). Cf. *Maiz v. Virani*, 253 F.3d 641, 675 (11 Cir. 2001).

[9]See, e.g., *Fujisawa Pharmaceutical Co. Ltd. v. Kapoor*, 115 F.3d 1332, 1335-36 (7th Cir. 1997); *McCool v. Strata Oil*, 972 F.2d 1452, 1456 (7th Cir. 1992); *Ritchey v. Horner*, 244 F.3d 635, 638-641 (8th Cir. 2001); *Great Rivers Co-Op of S.E. Iowa v. Farmland Indus.*, 120 F.3d 893, 897 (8th Cir. 1997) ("We assume the facts of Tracey's knowledge as he alleges them."); *Davidson v. Wilson*, 973 F.2d 1391, 1393, 1400 (8th Cir. 1992).

agree with the district court here that respondents are not entitled to a judgment as a matter of law on the statute of limitations defense. Moreover, they would affirm the jury's decision that before 1985 the petitioners did not know enough facts to trigger their duty to inquire.

Respondents argue that petitioners are asking this Court to adopt a new rule of law that relieves victims of the "obligation to show they were reasonably diligent."[10] Respondents' argument is without merit. Indeed, the petition is asking the Court to resolve a circuit split regarding the fundamental and important issue regarding what *triggers* the victim's duty to inquire. Stated another way, the conflict pertains to the question of when the RICO statute of limitations begins to run, which this Court acknowledges is a question that divides the courts of appeals.[11] The petition gives the Court an appropriate opportunity to settle the question.

II.

PREVIOUS OPINIONS OF THE SUPREME COURT HAVE NOT CONSIDERED PETITIONERS' CONTENTIONS

Respondents argue that *Rotella v. Wood*[12] and *Klehr v. A.O Smith Corp.*[13] are dispositive of petitioners RICO

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[10] Brief p. 12.

[11] *See, e.g., Rotella v. Wood,* 528 U.S. 549, 553 (2000) ("Although we chose a uniform 4-year period on a Clayton Act analogy . . . we did not decide when the period began to run, and the question has divided the Courts of Appeals."). Also *id. at 554 n.2* ("We do not, however, settle upon a final rule . . . . ").

[12] *Ibid.*

[13] 521 U.S. 179 (1997).

claims here.[14] Neither case, however, established a "per se rule of imputation upon receipt" nor a "bare access accrual" rule. Moreover, petitioners are not asserting either the "injury and pattern discovery" rule, rejected by *Rotella*[15], or the "last predicate act" rule, rejected by *Klehr.*[16] Finally, this case is factually different from *Rotella* and *Klehr.*[17]

From another angle, the court of appeals' per se rule looks like a variation of the Clayton Act's "straight injury occurrence" rule, under which "discovery would be irrelevant."[18] The Clayton Act accrual rule, however, has its limits in civil RICO cases, which, "unlike typical antitrust cases, involve fraud claims."[19] Some might argue that for purposes of civil RICO cases the Court could soften the Clayton Act "injury occurrence" rule with tolling principles. The question this

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[14] Brief p. 7-8.

[15] *Rotella, supra.,* 528 U.S. at 554.

[16] *Klehr, supra.,* 521 U.S. at 188.

[17] In *Rotella,* a fiduciary relationship did not exist between the plaintiff and the defendant psychiatric hospital when the plaintiff learned that the defendant had pled guilty to criminal fraud charges three years before plaintiff filed suit. *Rotella, supra.,* 528 U.S. at 559. (The fiduciary relationship ended when the defendant discharged the plaintiff eleven years before he filed suit. *Id.* at 551.) Moreover, plaintiff did not deny he knew of his injury when it occurred eleven years before he sued the defendant. *Id.* at 558-59.

In *Klehr,* the parties did not have a fiduciary relationship. Indeed, the plaintiffs were dairy farmers, and the defendant was a store selling silos to the public. *Klehr, supra.,* 521 U.S. at 183-84 Moreover, the plaintiffs did not deny that knew they were injured when they purchased silos from the defendant. *Ibid.*

[18] *Rotella, supra.,* 528 U.S. at 554, n.2.

[19] *Klehr, supra.,* 521 U.S. at 191.

petition presents, however, pertains to inquiry notice, not tolling principles.[20]

III.

THE RECORD SUPPORTS THE PETITION

Contrary to respondents' brief, this RICO case is based on respondents' mail and wire fraud.[21] Moreover, the record shows petitioners testified that the 5% of annual income fee included investments, and that petitioners and respondents contemplated and agreed that compensation from the investments would not be in addition too, or on top of the 5% of annual income.[22] In sum, the record shows that the district court and the jury have it right here: the RICO claims are not time-barred.[23]

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[20] Respondents argue that the "no bare access accrual rule" would make "tolling automatic and virtually irrefutable, regardless of the disclosures." Brief p. 14. Respondents do not understand, apparently, that the issue of what facts trigger the duty to inquire (or start the clock running) is analytically distinct from the issue of what facts toll the running after the clock starts. Indeed, the Seventh Circuit and Eighth Circuit's cases plainly state that the rule precludes "bare access" from automatically *triggering* the duty to inquire (see, e.g., *Fujisawa, supra.*, 115 F.3d at 1335 ["But more than bare access to necessary information is required to start the statute of limitations running. There must also be a suspicious circumstance to trigger a duty to exploit the access; an open door is not by itself a reason to enter a room."]; see also *Great Rivers, supra.*, 120 F.3d at 897). *Ibid.*

[21] Indeed, after listening and watching the witnesses testify and considering all the evidence presented at trial, the district court agreed with the jury that petitioners had proven that they were victims of respondents' scheme of mail and wire fraud, and therefore entitled to judgment under RICO. Appendix A-11, A-12, A-13.

[22] Appendix C. pp. 27-30; 162-164.

[23] See, e.g., Appendix C and D.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted

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Date: August 13, 2001

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAFFIT PINCAY, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-1445-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	ORDER
	)	GRANTING
	)	PLAINTIFF'S
	)	MOTION
Defendants.	)	FOR
	)	RECONSIDERATION
	)	
CHRISTOPHER J. MCCARRON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-4965-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	
Defendants.	)	
	)	

Filed
Clerk, U.S. District Court
August 15, 1997
Central District of California
By Deputy

Entered
Clerk, U.S. District Court
August 18, 1997
Central District of California
By Deputy

I.

BACKGROUND

These consolidated actions arose out of plaintiffs' claims of misconduct by their longtime business managers and financial advisors in connection with the investment of plaintiffs' funds in a series of limited partnerships. The jury returned a special verdict in favor of all of plaintiffs' claims, including a federal RICO claim and state law claims for breach of fiduciary duty, breach of oral agreement, negligence, fraud, and negligent misrepresentation. The Court entered the judgment in favor of plaintiffs Laffit Pincay ("Pincay") and Christopher J. McCarron ("McCarron").

Defendants Vincent Andrews, Jr., Vincent Andrews Management Corp. ("VAMC"), and Robert L. Andrews then moved for judgment as a matter of law or, alternatively, for a new trial. Before the Court ruled on the motion, the action was stayed pending defendants' bankruptcy proceedings. After the bankruptcy stays were lifted, the Court granted VAMC judgment as a matter of law on plaintiffs' RICO claim and denied defendants' motion in all other respects.

Plaintiffs now move for reconsideration of that decision. The parties have briefed other post-trial issues, including whether the individual defendants are entitled to a new trial or judgment as a matter of law in light of the judgment for VAMC and whether plaintiffs' election of RICO remedies should be considered binding.

II.

MOTION FOR RECONSIDERATION

A. *Legal Standard*

Reconsideration is generally a matter for the discretion of the Court, *Fuller v. M.G. Jewelry,* 950 F.2d 1437, 1441 (9th

Cir. 1991). It is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. *School District No. 10, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A court may reconsider an interlocutory order at any time. *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 907 F.Supp. 1349, 1353 (N.D. Cal. 1995) ("Reconsideration is justified if . . . there is a need to correct clear error or to prevent manifest injustice.").

In this case, plaintiffs argue that the Court's decision to grant judgment as a matter of law to VAMC was clearly erroneous. Because no final judgment has been issued for VAMC, the Court's decision was an interlocutory one. *See id.*

B. *Discussion*

Robert Andrews, Vincent Andrews, and VAMC are liable under the RICO statute if they were associated with "any enterprise" engaged in interstate commerce to conduct or participate "directly or indirectly" in the conduct of the enterprise's affairs through a pattern of racketeering. 18 U.S.C. § 1962(c). In the Pre-Trial Conference Order, plaintiffs identified VAMC as the only RICO enterprise involved in the case. The Ninth Circuit has held that a RICO enterprise cannot also be a defendant in a § 1962(c) RICO claim; the "enterprise" itself cannot also be a person who participated in the enterprise. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992); *Rae v. Union Bank*, 725 F.2d 478, 480-81 (9th Cir. 1984). The Court has ruled that "VAMC cannot, as a matter of law, be liable as a 'person' under § 1962(c) . . VAMC is entitled to judgment as a matter of law on plaintiff's RICO claim." (June 29, 1996, Order at 5.)

Plaintiffs do not dispute that VAMC could not be a RICO enterprise and a defendant in the case. However, they argue that judgment should be reinstated against VAMC based upon another RICO enterprise theory. Plaintiffs now contend that they presented evidence to the jury of a RICO enterprise composed of an association-in-fact of VAMC, Vincent Andrews, and Robert Andrews. Plaintiffs argue that the jury instructions and verdict indicate that the jury was presented with and persuaded by this association-in-fact theory.

Where "[f]acts supporting the court's findings and conclusions were before the court and were argued . . . [a] court properly may consider the pleadings and pretrial order to have been amended to conform to the evidence presented." *Sauers v. Alaska Barge* 600 F.2d 238, 244 (9th Cir. 1979). However, in its June 29 Order, the Court concluded that

> [p]laintiff's request to amend the Pretrial Conference Order to describe an enterprise consisting of both VAMC and the Andrews defendants is denied. No evidence of the structure or continuity of such an enterprise was presented to the jury; the jury never found that such an enterprise existed.

(June 29, 1996, Order at 7-8.).

Plaintiffs have identified new support for their argument. They contend that the jury instructions given by the Court indicate that they presented the association-in-fact theory to the jury. They have also identified portions of the closing arguments discussing their RICO claim in support of their contention. The jury was instructed that

> Plaintiffs contend that defendant Vincent Andrews Management Corporation was both a person liable under RICO and an enterprise which affect interstate or foreign commerce, and that defendants Robert Andrews and Vincent Andrews participated in this enter-

> prise through a pattern of racketeering activity. *Plaintiffs also claim that all three defendants were associated-in-fact as an enterprise that affected interstate or foreign commerce, and that all three defendants participated in this enterprise through a pattern of related activity.* Defendants deny these contentions.

(emphasis added).

The court has an obligation to read the verdict harmoniously with the jury instructions given. *Interstate Markings, Inc., v. Mingus Constructors, Inc.*, 941 F.2d 1010, 1013 (9th Cir. 1991). It must draw all possible inferences in favor of the jury's verdict and findings, *Donoghue v. Orange County*, 848 F.2d 926, 932 (9th Cir. 1988) (motion for directed verdict).

C. *Elements of Plaintiffs' RICO Claim*

To establish a RICO claim, plaintiffs were obligated to prove "1) that the defendant[s], 2) through the commission of two or more acts, 3) constituting a 'pattern,' 4) of 'racketeering activity,' 5) directly or indirectly invest[ed] in, or maintain[ed] an interest in, or participate[d] in, 6) an 'enterprise,' 7) the activities of which affect[ed] interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2nd Cir. 1983).

1. *Predicate Acts*

Plaintiffs argue that the predicate acts committed here were the investment recommendations made to them by defendants without disclosure of defendants' partnership interests. They contend that more than two of these recommendations were made in violation of the mail and wire fraud statutes.

2. *Pattern*

Plaintiffs had to establish that the acts constituted a "pattern," which has been interpreted by the Ninth Circuit

to create a test whether the acts of the defendants were related and posed a threat of continuing activity. *Ikuno v. Yip,* 912 F.2d 306, 309 (9th Cir. 1990); *Sun Sav. & Loan Ass'n v. Dierdorf,* 825 F.2d 187, 192 (9th Cir. 1987).

The evidence showed that defendants had a financial relationship with both plaintiffs that lasted for two decades. That relationship extended to a number of ventures in which defendants had financial interests at the time they recommended them to plaintiffs.[1] Plaintiffs presented evidence at trial that defendants failed to adequately disclose those interests to them. These recommendations were made in a similar fashion and continued over the course of a number of years.

Plaintiffs presented their pattern argument to the jury. In their closing argument, plaintiffs contended

> there has to be a pattern. Here we have a pattern in Laffit's case of over 18 years, a pattern I would submit to you is very clear. It was here. There was knowingly an attempt to deceive.

(Transcript, July 29, 1992, at 32.). Plaintiffs satisfied the pattern element of their claim.

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[1]For example, the Pre-Trial Conference Order states that VAMC was compensated for performing accounting services and had a wholly-owned subsidiary serve as a general partner for one of the partnerships in which plaintiffs invested. (Pre-Trial Conference Order, at 16-17, 23.) Robert Andrews and companies owned by him received fees from or participated in various limited partnerships. (Pre-Trial Conference Order, at 5, 9-11, 14-15. 20-24, 26-32, and 34-37.) Vincent Andrews also made money in various partnerships with the plaintiffs as a limited partner, a general partner, and a president or stockholder of corporate general partners. (Pre-Trial Conference Order, at 4, 9, 11-12, 14, 17-21, 25, and 33-34.).

3. *Racketeering Activity*

For RICO purposes, the term "racketeering activity" incudes a broad assortment of federal crimes, including the acts of mail and wire fraud alleged here. 18 U.S.C. § 1961(1)(B).

The mail and wire fraud statutes provide that anyone who devises "any scheme or artifice . . . for obtaining money or property by means of false or fraudulent pretenses, representations, or promises and uses the mail or wires to do so shall be fined not more than $1,000 or imprisoned for not more than five years, or both. 18 U.S.C. §§ 1341, 1343. Plaintiffs presented evidence to the jury that defendants presented investment opportunities to plaintiffs over the telephone and through the mails without disclosing their financial interests in those investments. The jury could have concluded that this evidence met the requirements set forth in the mail and wire fraud statutes.

To the extent that plaintiffs established that defendants committed mail and wire fraud, they have satisfied the racketeering element of the claim.

4. *Enterprise*

RICO defines "enterprise to "includ[e] . . . any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). To establish the existence of an association-in-fact enterprise, plaintiffs had to establish that the members of the enterprise "share[d] a common purpose of engaging in a course of conduct" and produce "evidence of an ongoing organization, formal or informal, and . . . that the various associates function[ed] as a continuing unit." *United States v. Turkette,* 452 U.S. 576, 583 (1981). Plaintiffs presented their association-in-fact argument to the jury, albeit confusingly, in their closing argu-

ment. With regard to "evidence of an ongoing organization," plaintiffs argued that

> [t]he people have to be employed by or in association with the enterprise. Well, there is no doubt about that, VAMC's relationship with Robert and with Vinny and the association with the conspiracy.

(Transcript, July 29, 1992, at 32.). Though plaintiffs initially observed that the association was somehow separate from the enterprise, by analyzing the agreement with the three defendants as a "relationship" and an "association" plaintiffs presented evidence of an association-in-fact to the jury in accordance with the jury instructions.

Plaintiffs also argued that

> VAMC was the vehicle that was used for all of these transactions. That is, they acted independently as a group. That sounds like it is a contradiction, but VAMC acted through Vinny, through Robert, and they acted themselves.

(Transcript, July 29, 1992, at 35.).[2] Here, plaintiffs described each of the three defendants as independent actors operating with one another. Each defendant "acted independently," but as a whole, they operated "as a group." Plaintiff's closing argument identified their association-in-fact claim of an ongoing, informal enterprise comprised of VAMC and its officers for the jury.

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[2]Enterprises composed of a corporation and its officers are not without precedent in the Ninth Circuit. The circuit has held that individual officers of a corporation can form an association-in-fact with the corporation. *U.S. v. Feldman,* 853 F.2d 648, 655-56 (9th Cir. 1988). Nor must the corporation be devoted entirely to illegal ends to do so. A corporate member of an association-in-fact "may be entirely legitimate and need not benefit from the racketeering." *Id.* at 657.

Plaintiffs also had to also show that the enterprise existed "separate and apart from the pattern of activity in which it engages" to prove their association-in-fact claim. *Turkette,* 452 U.S. at 583. To establish separate existence,

> it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering .... The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.

Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996). The Ninth Circuit has held that an association-in-fact of corporate entities and their officers has an ascertainable structure separate from racketeering. *United States v. Feldman,* 853 F.2d 648, 660 (9th Cir. 1988) (because corporation has a legal existence separate from its participation in racketeering, "the very existence of a corporation meets the requirement for a separate structure").[3]

Plaintiffs' closing argument referred to the separate existence of the enterprise and its activities other than those involving plaintiffs.

> Obviously, they talked with each other, *with other persons,* with themselves, with the plaintiffs, and there has to be a pattern.

(Transcript, July 29, 1992, at 32.) (emphasis added). Plaintiffs presented evidence to the jury from which it could

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[3]Plaintiffs observe that the Pre-Trial Conference Order established that the individuals involved in the conspiracy carried out functions in its furtherance separate from their corporate functions. That order stated that "Robert Andrews has been involved in finance and real estate since the middle '70's. These are separate endeavors from VAMC." (Pre-Trial Conference Order, at 5.).

conclude that the association-in-fact had a separate existence apart from the pattern on activity in which it engaged.

5. *Participation*

Section 1962(c) prohibits persons employed by or associated with an enterprise from conducting or participating in the conduct of the affairs of that enterprise through a pattern of racketeering activity. To prove participation, plaintiffs had to demonstrate the existence of a relationship between the pattern of racketeering activity and the enterprise. This nexus exists "when 1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or 2) the predicate offenses are related to the activities of the enterprise." *United States v. Sciotto,* 641 F.2d 47, 54 (2nd Cir. 1981); *Dierdorff,* 825 F.2d, at 195 (quoting *Sciotto*).

Defendants located and sold investment opportunities to plaintiffs without disclosing their interests in those investments. Those predicate offenses were related to the activities of the enterprise, which located and sold investments for a number of different clients, including plaintiffs.

6. *Interstate Commerce*

Finally, plaintiffs had to show that the racketeering activity must have some effect on interstate commerce. 18 U.S.C. § 1962(c). Plaintiffs presented evidence to the jury outlining the multistate investments made by plaintiffs with defendants' advice. In their closing argument, plaintiffs observed that

> [i]nterstate commerce just means you use the mails. You use the telephone. We have already been through that. I don't think there is any doubt about that. They certainly did business in more than one state. You heard them say they were in New York and Connecti-

> cut, and they were out here in California, and these businesses are in various other states.

(Transcript, July 29, 1992, at 31-32.) Plaintiff satisfied the interstate commerce element of the RICO offense.

D. *Conclusion*

In light of the jury instructions, the evidence presented by plaintiffs, and the closing argument delivered by their counsel, the Court's decision to grant judgment as a matter of law to defendant VAMC constituted clear error. *ACandS, Inc.,* 5 F.3d at 1263. Because the Court must read the verdict harmoniously with the jury instructions given and draw all possible inferences in favor of the jury's verdict and findings, plaintiff's motion for reconsideration is granted. *Mingus Constructors,* 941 F.2d at 1013; *Donoghue,* 848 F.2d at 932. The portion of the Court's June 29, 1996 Order granting judgment as a matter of law to defendants on plaintiffs' RICO claim is hereby vacated.

III.

JUDGMENT AS A MATTER OF LAW FOR ROBERT AND VINCENT ANDREWS

Defendants' motion for judgment as a matter of law as to Robert and Vincent Andrews was predicated on the dismissal of VAMC as a defendant. The Court has reconsidered that dismissal and finds that plaintiffs did present evidence of an association-in-fact RICO enterprise composed of the Andrews brothers and VAMC.

"Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is." *Garrison v. U.S.,* 62 F.2d 41, 42 (4th Cir. 1932); 9A Wright & Miller, *Federal Practice and Procedure* § 2531.

The standard for granting a directed verdict under Rule 50(a) mirrors the standard for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Robert and Vincent Andrews are liable under the RICO statute if they were associated with "any enterprises" engaged in interstate commerce to conduct or participate "directly or indirectly" in the conduct of the enterprise's affairs through a pattern of racketeering. 18 U.S.C. § 1962(c). The jury found, after considering the evidence, that the Andrews brothers were associated in fact with VAMC and that that enterprise engaged in racketeering activity. Substantial evidence supported that finding. Defendants had a long-term financial association with both plaintiffs. Between 1968 and 1987, plaintiffs entered into 55 written contracts (42 for Pincay, 13 for McCarron) through which they purchased limited partnership interests offered to them by VAMC and Vincent Andrews. Defendants had financial interests in many of the partnerships at the time they were recommended to plaintiffs.

Defendant's motion for judgement as a matter of law is denied.

IV

MOTION FOR A NEW TRIAL FOR ROBERT AND VINCENT ANDREWS

Because defendants' motion for a new trial was also predicated on the dismissal of VAMC as a defendant, it is also denied. "Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice." *Garrison v. U.S.*, 62 F.2d 41, 42 (4th Cir. 1932); 9A Wright & Miller, *Federal Practice and Procedure* § 2531.

The jury concluded that a RICO enterprise composed of the three defendants existed as an association-in-fact. That verdict was not contrary to the clear weight of the evidence and did not constitute a miscarriage of justice.

V.

ELECTION OF REMEDIES

Defendants argue that plaintiffs' election of RICO remedies before the resolution of the post-trial issues ought to be considered binding upon them now. However, "it ought to be obvious that, when a plaintiff erroneously thinks that a certain remedy is available to him, his futile attempt to procure it by legal proceedings ought not to be described as an election between alternative remedies...." *Warren Company v. Neel,* 184 F. Supp. 203, 212 (W.D. Ark. 1968).[4] This is particularly so in the context of RICO, because RICO remedies are cumulative and supplemental to common law remedies. *Arabian American Oil Co. v. Scarfone,* 939 F.2d 1472, 1478 (11th Cir. 1991)

Plaintiffs' election of RICO remedies is not binding. They may within fifteen (15) days make a new election of remedies in light of this Order if they desire.

Date: Aug 13, 1997 /s/ WM. MATTHEW BYRNE, JR.
Wm. Matthew Byrne, Jr.
United States District Judge

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[4] Cases holding parties to binding elections of remedies are rare. In California, "the doctrine of election of remedies ... has been repeatedly criticized and seems to be falling into disfavor. Late California decisions illustrating binding election are comparatively rare...." 3 Witkin, *California Procedure* § 132, p.160.